THE LAW OF NATIONS;

OR,

PRINCIPLES

OF THE

LAW OF NATURE;

APPLIED TO THE CONDUCT AND AFFAIRS OF

NATIONS AND SOVEREIGNS.

By M. DE VATTEL.

A WORK TENDING TO DISPLAY THE TRUE INTEREST OF POWERS.

Nihil eſt enim illi principi Deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius, quam concilia cœtuſque hominum jure ſociati, quæ civitates appellantur.

CICER. *Somn. Scipion.*

TRANSLATED FROM THE FRENCH.

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M.DCC.XCII.

10/16/41

PREFACE.

THE Law of Nations, though a ſubject ſo noble and important, has not been hitherto treated of with all the care it deſerves. The greateſt part of mankind have therefore only a vague, and very incomplete, and, very often, even a falſe notion of it. The generality of writers, and even celebrated authors, comprehend under the name of the Law of Nations, only certain maxims, and cuſtoms, that have taken place between different nations, and become obligatory with reſpect to them, by their mutual conſent. This is to confine, within very narrow bounds, a law ſo extenſive in its own nature, and in which the whole human race are ſo intimately concerned; and thus they at the ſame time degrade it, by miſtaking its true origin.

The Law of Nations is certainly a natural law, ſince the Law of Nature is not leſs obligatory, with reſpect to ſtates, or to men united in political ſociety, than to individuals. But to form an exact knowledge of this law it is not ſufficient to know, what the Law of Nature preſcribes to the individuals of the human race. The application of a rule to various ſubjects, can no otherwiſe be made, but in a manner agreeable to the nature of each ſubject; whence there reſults a natural Law of Nations as a particular ſcience, conſiſting in a juſt and rational application of the Law of Nature to the affairs and conduct of nations and ſovereign princes. All thoſe treaties, therefore, in which the Law of Nations is blended and confounded with the ordinary Law of Nature, are incapable of conveying a diſtinct idea, a ſolid knowledge of the ſacred Law of Nations.

The Romans have often confounded the Law of Nations with the Law of Nature, calling the Law of Nations (*Jus Gentium*) the Law of Nature, as being generally acknowledged and adopted by all polite nations [a]. We know the definitions given by the Emperor Juſtinian of the Law of Nature, the Law of Nations, and the Civil Law. *The Law of Nature*, ſays he, *is that which nature teaches to all animals:*

[a] Neque vero hoc ſolum naturâ, id eſt, jure gentium, &c. *Cicer. de Offic. Lib.* III. *C.* 5.

mals[b]: thus he defines the Law of Nature in the moſt extenſive ſenſe, and not the Law of Nature peculiar to man, that flows from his rational, as well as from his animal nature. *The Civil Law*, that Emperor adds, *is that which each nation has eſtabliſhed for itſelf, and is proper to each ſtate or civil ſociety. And that law, which natural reaſon has eſtabliſhed among all mankind, and is equally obſerved by all people, is called the Law of Nations, as being a Law which all nations follow*[c]. In the following paragraph the Emperor ſeems to approach nearer to the ſenſe we have at preſent given to this term. *The Law of Nations*, ſays he, *is common to the whole human race. The exigencies and neceſſities of mankind have induced all nations to conſtitute certain rules of right. For wars have ariſen and produced captivity and ſervitude, which are contrary to the Law of Nature; ſince originally, and by the Law of Nature, all men were born free*[d]. But what he adds, that almoſt all

[b] Jus naturale eſt, quod natura omnia animalia docuit. *Inſtit. Lib.* I. *Tit.* II.

[c] Quod quiſque populus ipſe ſibi jus conſtituit, id ipſius proprium civitatis eſt, vocaturque jus civile, quaſi jus proprium ipſius civitatis: quod vero naturalis ratio inter omnes homines conſtituit, id apud omnes peræque cuſtoditur, vocaturque jus gentium, quaſi quo jure omnes gentes utantur. *Ibid.* § 1.

[d] Jus autem gentium omni humano generi commune eſt, nam uſu exigente & humanis neceſſitatibus, gentes humanæ jura quædam ſibi conſtituerint. Bella etenim orta ſunt & captivitates ſequutæ & ſervitutes, quæ ſunt naturali juri contrariæ. Jure enim naturali omnes homines ab initio liberi naſcebantur. *Ibid.* § 2.

contracts,

contracts, thoſe of buying and ſelling, of hire, partnerſhip, truſt, and an infinite number of others, owe their origin to this law of nations; this I ſay, proves that Juſtinian only thought, that according to the ſtate and ſituations in which men are placed, right reaſon has dictated to them certain maxims of equity, ſo founded on the nature of things, that they have been acknowledged and admitted by all. This is ſtill no more than the Law of Nature, ſuitable to all mankind.

The Romans, however, acknowledged a law obligatory to nations with reſpect to each other, and to this law they referred that of embaſſies. They had alſo their *Fecial* Law, which was nothing more than the Law of Nations, with reſpect to public treaties, and particularly to war. The *fecials* were the interpreters, the guardians, and in ſome ſort the prieſts of the public faith [e].

The moderns generally agree to confine the Law of Nations to the juſt regulations which ought to ſubſiſt between nations or ſovereign ſtates. They differ only in the idea they en-

[e] *Feciales*, quod fidei publicæ inter populos præerant: nam per hos fiebat, ut juſtam conciperetur bellum (& inde deſitum) & ut fœdere fides pacis conſtitueretur. Ex his mittebant, antequam conciperetur, qui res repeterent: & per hos etiam nunc fit fœdus. *Varro de Ling. Lat. Lib.* IV.

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tertain of the origin of theſe regulations, and the foundations upon which they are eſtabliſhed. The celebrated Grotius underſtands by the Law of Nations, a law eſtabliſhed by the common conſent of the people, and he thus diſtinguiſhes it from the Law of nature: "When "ſeveral perſons, in various times and places, "maintain the ſame thing as certain; this "ought to be referred to a general cauſe. Now "in queſtions of this kind, the cauſe can only "be attributed to the one or the other of "theſe two, either a juſt conſequence drawn "from natural principles, or an univerſal con-"ſent. The firſt diſcovers to us the Law "of Nature, and the other the Law of Na-"tions[f]."

It appears from many paſſages in his excellent work, that this great man had a glimpſe of the truth: but as he broke up the land, if I may be allowed the expreſſion, and inveſtigated an important ſubject, much neglected before his time, it is not ſurpriſing that his mind, overcharged by an immenſe variety of objects and citations which entered into his plan, he could not always acquire thoſe diſtinct ideas ſo neceſſary in the ſciences. Perſuaded that nations, or ſovereign powers, are ſubject to the authority of the Law of Nature, the obſervation of which he ſo fre-

[f] *De Jure Belli & Pacis*, tranſlated by Barbeyrac: Preliminary Diſcourſe, § 41.

quently

quently recommends to them; this learned man, in fact, acknowledged a natural Law of Nations, which he ſomewhere calls the internal Law of Nations; and perhaps it will appear that he differed from us, only in his terms. But we have already obſerved that in order to form this natural Law of Nations, it is not ſufficient, ſimply to apply to nations, what the Law of Nature decides in regard to individuals. And beſides, Grotius, by his very diſtinction, and in affecting to give the name of the *Law of Nations* only to maxims eſtabliſhed by the conſent of the people, ſeems to intimate, that ſovereigns, with reſpect to each other, can only preſs the obſervation of theſe laſt maxims, reſerving the *internal* law for the direction of their own conſciences. If therefore from the idea that political ſocieties or nations live with reſpect to each other, in a reciprocal independence, in the ſtate of nature, and that they are ſubject, as political bodies to the Law of Nature, Grotius had moreover conſidered, that the law ought to be applied to theſe new ſubjects, in a manner ſuitable to their nature, this judicious author would have acknowledged, without difficulty, that the natural Law of Nations is a particular ſcience; that by this law is produced even an *external* obligation between nations, independently of their volition; and that the conſent of different ſtates is only the foundation and ſource of a kind

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of particular law, called the *Arbitrary Law of Nations*.

Hobbes, in a work wherein he diſcovers great abilities, notwithſtanding his paradoxes, and deteſtable maxims: Hobbes, I ſay, was, I believe, the firſt who gave a diſtinct, though imperfect idea of the Law of Nations. He divides the *Law of Nature*, into that of *man*, and that of *ſtates*, and this laſt according to him, is what is commonly called the Law of Nations. *The maxims*, he adds, *of each of theſe laws are preciſely the ſame; but as ſtates in ſome meaſure acquire perſonal property, the ſame law that is termed natural when we ſpeak of the duties of individuals, is called the Law of Nations, when applied to the entire bodies of a ſtate or nation* [g]. This author has well obſerved, that the Law of Nations is the Law of Nature applied to ſtates or nations. But we ſhall ſee in the courſe of this work, that he is miſtaken in imagining, that the Law of Nature can ſuffer no neceſſary change in this application; from whence he has concluded, that the maxims of the Law of Nature, and thoſe

[g] Rurſus (*Lex*) *Naturalis* dividi poteſt in naturalem hominum, quæ ſola obtinuit dici *Lex Naturæ*, et naturalem *civitatum*, quæ dici poteſt *Lex Gentium* vulgo autem *Jus Gentium* appellatur. Præcepta utriuſque eadem ſunt: ſed quia civitates ſemel inſtitutæ induunt proprietates hominum perſonales, lex quam loquentes de hominum ſingulorum officio *naturalem* dicimus applicata totis civitatibus, nationibus, ſive gentibus vocatur *Jus Gentium*. *De Cive C.* XIV. § 4.

of

of the Law of Nations are preciſely the ſame.

Puffendorf declares, *that he ſubſcribes abſolutely to this opinion eſpouſed by Hobbes* [h]. He has not therefore treated ſeparately of the Law of Nations; but has every where united it with the Law of Nature properly ſo called.

Barbeyrac the tranſlator and commentator on Grotious and Puffendorf has approached much nearer to a juſt idea of the Law of Nations. Though the work is in every body's hands, I ſhall here, for the convenience of the reader, tranſcribe the note of that learned tranſlator of Grotius's Law of War and Peace, Book I. Chap. I. § 14. Note 3. "I confeſs ſays he, that there "are laws common to all nations or affairs, "which ought to be obſerved by every nation "with reſpect to each other; and if people "call this the *Law of Nations*, they may do ſo "with great propriety. But the conſent of dif-"ferent people is not the foundation of thoſe "obligations, by which they are bound to ob-"ſerve thoſe laws, and therefore cannot take "place here in any manner, the principles and "obligations of ſuch a law, are in fact the "ſame as thoſe of the Law of Nature, properly "ſo called: all the difference conſiſts in the ap-"plication made of it, varied a little on ac-

[h] Puffendorf's Law of Nature and Nations, *L.* II. *C.* III. § 23.

"count

"count of the difference that ſometimes ſubſiſts "in the manner in which ſocieties diſcharge their "affairs with reſpect to each other."

The author we have juſt quoted has well obſerved, that the rules and deciſions of the law of nature cannot be applied merely and ſimply to ſoverdign ſtates, and that they muſt neceſſarily ſuffer ſome changes according to the nature of the new ſubjects to which they are applied. But it does not appear that he has ſeen the full extent of this idea, ſince he ſeems not to approve of treating the Law of Nations ſeparately from the Law of Nature, as it relates to individuals. He only praiſes Budæus's method, ſaying, "that that author had reaſon to "ſhew, in his (*Elementa Philoſ. Pract.*) after "particularly treating of the Law of Nature, "the application that may be made of it, in "relation to nations with reſpect to each other; "ſo far, at leaſt, as things may permit or re-"quire"[1] This was placing it upon a good footing. But it required more profound reflection, and more extenſive views, in order to conceive the idea of a ſyſtem of the Law of Nature, that was thus the law of ſovereigns and of nations; to perceive the utility of ſuch a work, and eſpecially to be the firſt to execute it.

[1] Note 2 on Puffendorf's Law of Nature and Nations, Book II. Chap. III. § 23. I have not been able to procure Budæus's work, from which I ſuſpected that Barbeyrac has derived this idea of Law of Nations.

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This glory was reſerved for the Baron de Wolfius. That great philoſopher ſaw that the application of the Law of Nature to nations in a body, or to ſtates, modified by the nature of the ſubjects, could not be made with preciſion, with clearneſs and ſolidity, without the aſſiſtance of general principles, and the leading opinions that ought to regulate them; that it is by the means of theſe principles alone, that we can evidently ſhew how, in virtue of the Law of Nature itſelf, the deciſions of that law with reſpect to individuals, ought to be changed and modified, when they are applied to ſtates or political ſocieties, and to form this a natural and neceſſary law of nations [k]: whence he has concluded, that it was requiſite to form a particular ſyſtem of the Law of Nations, and he has happily executed it. But it is juſt we ſhould here inſert what Wolfius himſelf has ſaid in his preface.

[k] If it was not more proper to abridge, in order to avoid repetitions, and to take advantages of notions already formed and eſtabliſhed in the minds of men; if, I ſay, from all theſe reaſons, it was not more convenient to ſuppoſe here, the knowledge of the ordinary Law of Nature, in order to apply it to ſovereign ſtates; inſtead of ſpeaking of that application, it would be more exact to ſay, that as the Law of Nature, properly ſo called, is the natural law of man, founded on his nature; the natural Law of Nations, is the natural law of political ſocieties, founded on the nature of thoſe ſocieties. But as theſe two methods return to the ſame ſource, I have preferred the ſhorteſt. The Law of nature having been largely treated of; it is ſhorter to make ſimply the rational application of it to nations.

" Nations,

" Nations, ſays he[1], among themſelves ac-
" knowledge no other law, than that which na-
" ture herſelf has eſtabliſhed, it will therefore
" perhaps appear ſuperfluous to give a treatiſe on
" the Law of Nations diſtinct from the Law of
" Nature. But thoſe who think thus, have not
" ſufficiently ſtudied the ſubject. Nations, it is
" true, can only be conſidered as ſo many par-
" ticular perſons, living together in the ſtate of
" nature; and for that reaſon, we ought to ap-
" ply to them, all the duties and rights which
" nature preſcribes to, and lays upon mankind,
" as they are born naturally free, and are only
" bound to each other by the ſingle knot nature
" herſelf has tied. The law which ariſes from
" this application, and the obligation reſulting
" from it, proceed from that immutable law
" founded on the nature of man; and in this
" manner the Law of Nations certainly belongs
" to the Law of Nature: it is therefore called
" the natural Law of Nations, with reſpect to its
" origin, and the neceſſary law, in relation to
" its obligatory force. This law is common to
" all nations, and that which does not reſpect
" it in its actions, violates a law common to all
" people.

" But nations, or ſovereign ſtates, being
" moral perſons, ſubject to the obligations and

[1] A nation is here a ſovereign ſtate, an independent political ſociety.

" laws

" laws reſulting, in virtue of the Law of Na-
" ture, from the act of aſſociation, which has
" formed the political body; the nature and eſ-
" ſence of theſe moral perſons neceſſarily differ in
" many reſpects, from the nature and eſſence of
" phyſical individuals, or the men of whom they
" are compoſed. When therefore we would ap-
" ply to nations, the duties which the Law of
" Nature preſcribes to each man in particular and
" the right it attributes to him in order that he
" may fulfil his duties; theſe rights and theſe
" duties being no other than what are agreeable
" to the nature of the ſubjects, they muſt neceſſa-
" rily ſuffer in the application, a change ſuitable
" to the new ſubjects to which they are applied.
" We thus ſee, that the Law of Nations does not
" in every thing remain the ſame, as the Law
" of Nature, regulating the actions of indivi-
" duals. Why then may it not be treated of ſe-
" parately, as a law proper to nations?"

Being myſelf convinced of the utility of ſuch a work, I waited with impatience for that publiſhed by M. Wolfius, and as ſoon as it appeared, formed the deſign of facilitating, for the advantage of a greater number of readers, the knowledge of the great idea it preſents. The treatiſe wrote by the philoſopher of Hall on the Law of Nations, is dependent on all thoſe of the ſame author on the philoſophy of the Law of Nature. In order to read and underſtand

underſtand it, it is neceſſary to have ſtudied ſixteen or ſeventeen volumes in quarto which preceded it. Beſides, it is written in the method, and even in the form of geometrical works: obſtacles which render it almoſt uſeleſs to the perſons to whom the knowledge, and the taſte of the true principles of the Law of Nations are moſt important and moſt deſirable. I thought at firſt that I ſhould have had nothing farther to do, than detaching this treatiſe from his intire ſyſtem, by rendering it independent of every thing M. Wolfius had ſaid before, and clothing it in a more agreeable form, more proper to afford it a reception in the polite world. I made ſome attempts to do this; but I ſoon found, that if I would procure readers from that order of perſons for whom I deſigned to write, and produce any advantage from it, I ought to form a very different work from that I had before in my eye, and to begin my labours again. The method M. Wolfius has followed, has ſpread a dryneſs through his book, and has in many reſpects rendered it incomplete. The ſubjects are diſperſed through it in a manner that gives great fatigue to the attention; and as the author has treated of the public univerſal law, in his law of Nature, he frequently contents himſelf with referring to it, when in the Law of Nations he ſpeaks of the duties of a nation towards itſelf.

I have

I have therefore confined myſelf to drawing from M. WOLFIUS's work what I found beſt, eſpecially with reſpect to definitions and general principles; but I have made uſe of choice in drawing them from this ſource, and have accommodated to my plan the materials I have taken from thence. Thoſe who have read M. WOLFIUS's treatiſes of the Law of Nature, and the Law of Nations, will ſee what advantage I have made of them. Had I every-where pointed out what I have borrowed, my pages would have been crowded with citations equally uſeleſs and diſagreeable to the reader. It is better to acknowledge here, once for all, the obligations I am under to this great maſter. Though my work, as thoſe will ſee who give themſelves the trouble to make the compariſon, be very different from his, I confeſs that I ſhould never have had the aſſurance to enter into ſo vaſt a field, if the celebrated philoſopher of Hall had not marched before me, and offered me the advantage of his light.

I have however ſometimes left my guide, and oppoſed his ſentiments: and ſhall here give ſeveral examples of it. M. WOLFIUS, drawn away, perhaps, by a crowd of writers adopts ſeveral propoſitions [m] to treat of the

[m] In the VIIIth Part of the Law of Nature, and in the Law of Nations.

nature

nature of *patrimonial* kingdoms, without rejecting or contradicting ſentiments ſo injurious to mankind. I do not even admit of denomination, which I find equally ſhocking, improper and dangerous, both in its effects, and in the impreſſions it may give to ſovereigns; and in this, I flatter myſelf, I ſhall obtain the ſuffrage of every man who has the reaſon and ſentiments of a true citizen.

M. WOLFIUS determines (*Jus Gent.* § 878.) that we are naturally allowed to make uſe of poiſoned arms in war. This deciſion ſhocks me, and I am ſorry to find it in the work of ſo great a man. Happily for the human race it is not difficult to ſhew the contrary, even from M. WOLFIUS's principles themſelves. What I have ſaid on this ſubject may be ſeen in Book III. § 156.

From the beginning of my work, it will be found that I differ intirely from M. WOLFIUS, in the manner of eſtabliſhing the foundations of that ſpecies of the Law of Nations, which we call *Voluntary*. M. WOLFIUS deduces the idea from a kind of grand Republic (*Civitatis Maximæ*) inſtituted by nature herſelf, and of which all the nations of the world are members. According to him the *Voluntary* Law of Nations would reſemble the civil law of that grand Republic. This idea does not ſatisfy me, and I do not find the fiction of ſuch a Republic, either very juſt,

or ſolid enough to deduce the rule of a Law of Nations univerſally and neceſſarily admitted among ſovereign ſtates. I acknowledge no other natural ſociety among nations than that which nature has eſtabliſhed among all men. It is eſſential to all civil ſociety *(Civitatis)* that each member has given up his right to the body of the ſociety, and that it has an authority of commanding all the members, of giving them laws, and of conſtraining thoſe who refuſe to obey. Nothing like this can be conceived or ſuppoſed to ſubſiſt between nations. Each ſovereign ſtate pretends to be, and actually is, independent of all others. They ought all, according to M. Wolfius himſelf, to be conſidered as ſo many individuals who live together in the ſtate of nature, and acknowledge no other laws but thoſe of nature, or of her author. Now nature eſtabliſhed a general ſociety among all men when ſhe laid them under an abſolute neceſſity of the ſuccours of thoſe in their own likeneſs, in order to live like men; but ſhe has not expreſsly impoſed upon them the obligation of uniting in civil ſociety, properly ſo called; and if all followed the laws of this good mother, their being ſubject to civil ſociety would be of no uſe? 'Tis true, men being far from voluntarily obſerving the rules of the Law of Nature, they have had recourſe to a political aſſociation, as the only proper remedy againſt the depravity of

of the multitude, as the only means of ſecuring the eſtates of the good, and of reſtraining the wicked: and the Law of Nature itſelf approves of this eſtabliſhment. But it is eaſy to perceive, that a civil ſociety between nations is not ſo neceſſary as between individuals. We cannot then ſay that nature equally recommends it, much leſs, that ſhe has preſcribed it. Individuals are ſo made, and are capable of doing ſo little by themſelves, that they can ſcarcely ſubſiſt without the ſuccours and laws of civil ſociety. That as ſoon as a conſiderable number of them are united under the ſame government, they find themſelves able to ſupply moſt of their wants, and the ſuccours of other political ſocieties is not ſo neceſſary to them as that of individuals is to an individual. Theſe ſocieties have ſtill, it is true, powerful motives for carrying on a communication and commerce with each other, and they are even obliged to it; for no man can, without good reaſon, refuſe aſſiſtance to another man. But the Law of Nature may ſuffice to regulate this commerce, and this correſpondence. States conduct themſelves in a different manner from individuals. It is not commonly the caprice or blind impetuoſity of a ſingle perſon that forms the reſolutions, and determines the ſteps of the public: they are carried on with more deliberation and circumſpection: and, on difficult or important occaſions, they arrange themſelves, and enter into rules, by means of trea-

ties. Let us add, that independence is ever neceſſary to each ſtate, in order that it may diſcharge what it owes to itſelf and to the citizens, and conduct itſelf in the moſt convenient manner. Once more, it is ſufficient that nations conform to what is required of them by the natural and general ſociety, eſtabliſhed among all mankind.

But ſays M. WOLFIUS, the rigour of this Law of Nature cannot be always followed in the commerce and ſociety of nations; changes muſt be made in it, which you can only deduce from this idea of a kind of grand republic of nations, whoſe laws, dictated by ſound reaſon, and founded on neceſſity, will regulate thoſe changes to be made in the natural and neceſſary Law of Nations, as the civil laws determine thoſe that ſhould be made in a ſtate in relation to the natural laws of individuals. I do not perceive the neceſſity of this conſequence, and I dare promiſe myſelf to ſhew in this work, that all the modifications, reſtrictions, and, in a word, all the changes neceſſary to be introduced into the affairs of nations, according to the rigour of the Law of Nature, from which is formed the voluntary Law of Nations; I dare promiſe myſelf, I ſay, that all theſe changes are deduced from the natural liberty of nations, from the intereſt of their common ſafety, the nature of their mutual correſpondence, their reciprocal

ciprocal duties, and the distinctions of the internal and external, their perfect and imperfect laws, by reasoning nearly as M. Wolfius has done, with respect to individuals, in his treatise on the Law of Nature.

We see in this treatise how the rules which in virtue of natural liberty ought to be admitted in the external law, do not destroy the obligation imposed on each in point of conscience, by the internal law. It is easy to apply this doctrine to nations, and to inform them, by distinguishing carefully the internal from the external law, that is, the necessary from the voluntary Law of Nations, that they are not permitted to do whatever they may be able to do with impunity, if it be not approved by the immutable laws of justice, and the voice of conscience.

Nations being equally obliged to admit among them their exceptions and modifications, produced by the rigour of the necessary law, whether it be deduced from the idea of a great republic, of which all people are supposed to be the members, or whether drawn from the sources where I propose to search for them; nothing hinders our calling the right which results from them the voluntary Law of Nations, to distinguish it from the *necessary* and *internal* Law of Nations and of Conscience. Names are pretty indifferent

indifferent in themſelves; what is really important, is carefully to diſtinguiſh theſe two kinds of laws, in order that we may never confound what is juſt and good in itſelf, with what is only tolerated by neceſſity.

The Neceſſary and Voluntary Law of Nations, are then both eſtabliſhed by nature; but each in a different manner: the firſt as a ſacred law, which nations and ſovereigns ought to reſpect and follow in all their actions; the ſecond, as a rule which the welfare and common ſafety obliges them to admit in their tranſactions with each other. The neceſſary law immediately proceeds from nature; and that common mother of men recommends the obſervance of the voluntary Law of Nations, in conſideration of the ſtate in which nations are found with reſpect to each other, and for the advantage of their affairs. This double law founded on certain and invariable principles, is capable of demonſtration, and will be the principal ſubject of this work.

There is another kind of the Law of Nations, which authors call arbitrary, becauſe it proceeds from the will or conſent of nations. States as well as individuals may acquire rights, and contract obligations by expreſs engagements, by pacts and treaties: there reſult from theſe a conventional Law of Nations, peculiar to the contracting powers. Nations may alſo bind themſelves by tacit conſent: upon this is founded whatever

whatever manners have introduced among different people, and which form the cuſtoms of nations, or the Law of Nations founded on cuſtom. It is evident that this law can impoſe an obligation only on thoſe nations who have adopted theſe cuſtoms by long uſe. It is a particular law, in the ſame manner as the conventional law. Both derive all their force from the Law of Nature, which preſcribes to nations the obſervation of their engagements, whether expreſs or tacit. The ſame Law of Nature ought to regulate the conduct of ſtates in relation to the treaties they conclude, and to the cuſtoms they adopt. I am obliged to confine myſelf to the general rules and principles which the Law of Nature furniſh for the direction of ſovereigns in this reſpect. The particulars of the different treaties, and the various cuſtoms of different people belong to hiſtory, and not to a ſyſtematic treatiſe on the Law of Nations.

Such a treatiſe ought principally to conſiſt, as we have already obſerved, in a judicious and rational application of the principles of the Law of Nature to the affairs and conduct of nations and ſovereigns. The ſtudy of the Law of Nations ſuppoſes then a previous knowledge of the uniform Law of Nature. I ſuppoſe therefore, that my readers, to a certain degree at leaſt, are acquainted with this knowledge. However, as we do not love to go elſewhere in ſearch of

proofs

proofs of what our author advances, I have taken care to eſtabliſh, in a few words, the moſt important of theſe principles of the Law of Nature, which I have applied to nations. But I have not always thought it neceſſary to demonſtrate them, by tracing them to their primary foundations, and have ſometimes contented myſelf with ſupporting them on common truths, acknowledged by every reader of integrity, without puſhing the analyſis further. It is ſufficient for me to perſuade, and for this purpoſe to advance nothing as a principle, that will not eaſily be admitted by every ſenſible man.

The Law of Nations is the law of ſovereigns. It is principally for them, and for their miniſters, that it ought to be written. All men are indeed intereſted in it; and the ſtudy of its maxims are, in a free country, proper for every citizen: but it would ſignify little to inſtruct only private perſons, who are not called to the councils of nations, and who do not determine their ſteps. If the conductors of ſtates, if all thoſe who are employed in public affairs, condeſcended to apply ſeriouſly to the ſtudy of a ſcience which ought to be their law and their compaſs, what fruits might we not expect from a good treatiſe on the Law of Nations? We every day perceive thoſe of a good body of laws in civil ſociety: the Law of Nations is as much above the civil

civil law in its importance, as the proceedings of nations and ſovereigns ſurpaſs in their conſequences thoſe of private perſons.

But fatal experience too plainly proves, how little thoſe who are at the head of affairs trouble themſelves about what is right, where they hope to find their advantage. Contented with applying themſelves to politics, that are often falſe, ſince they are often unjuſt; moſt of them believe they have done enough, when they have well ſtudied them. In the mean time we may ſay of ſtates, what has been long acknowledged in regard to private perſons; that there is no better and ſafer policy than that which is founded on virtue. CICERO, as great a maſter in the conduct of a ſtate as in eloquence and philoſophy, did not content himſelf with rejecting the vulgar maxim, that the republic could not be happily governed without committing injuſtice; he went ſo far as to eſtabliſh the contrary as an invariable truth, and maintained, that no one could adminiſter the public affairs in a ſalutary manner, if he did not attach himſelf to the moſt exact juſtice [n].

Providence, from time to time, gives the world kings and miniſters penetrated with this great

[n] Nihil eſt quod adhuc de Republica putem dictum, & quo poſſim longius progredi, niſi ſit confirmatum, non modo falſum eſſe illud, ſine injuria non poſſe, ſed hoc veriſſimum, ſine ſumma juſtitia Rempublicam regi non poſſe. CICER. *Fragment. ex Lib. de Republica.*

truth,

truth. Let us not loſe the hope that the number of theſe wiſe conductors of nations will one day be multiplied; and while we wait for it, let each of us labour in his ſphere, to bring on ſuch happy times.

It is principally with a view of making thoſe reliſh this work, to whom it is of the moſt importance that they ſhould read and reliſh it, that I have ſometimes joined examples to maxims; and I have been confirmed in my opinion, by the approbation of one of thoſe miniſters who are the enlightened friends of the human race, and who alone ought to enter into the councils of kings. But I have uſed this ornament with reſerve. Without ever endeavouring to make a vain parade of erudition, I have only been willing from time to time, to relax the mind of my reader, or to render the doctrine more ſenſible by an example; ſometimes to ſhew that the practice of nations is conformable to principle; and when I have found occaſion, I have endeavoured above all things, to inſpire a love of virtue, by ſhewing it amiable, worthy of our homage, in ſome truly great men, and even moſt ſolidly uſeful, by ſo me ſtriking paſſages of hiſtory. I have taken the greateſt part of my examples from modern hiſtory, as moſt intereſting, and to avoid repeating thoſe which GROTIUS, PUFFENDORF, and their commentators have accumulated.

As

As to the reſt, both in theſe examples and in my reaſonings, I have ſtudied to offend nobody, propoſing to obſerve religiouſly the reſpect that is due to nations and to ſovereign powers. But I have made it a ſtill more inviolable law to reſpect the truth and the intereſt of the human race. If the baſe flatterers of deſpotic power riſe up againſt my principles, I ſhall have on my ſide the virtuous man, the friend of the laws, the man of probity, and the true citizen.

I ſhould have choſen to be ſilent, could I not have followed in my writings the light of conſcience. But nothing has reſtrained my pen, and I am incapable of proſtituting it to flattery. I was born in a country of which liberty is the ſoul, the treaſure, and the fundamental law: I may alſo, from my birth, be the friend of all nations. Theſe happy circumſtances have encouraged me to attempt the rendering myſelf uſeful to mankind by this work. I am ſenſible of the weakneſs of my abilities, and my talents; I have ſeen that I have undertaken a painful taſk; but I ſhall be ſatisfied if readers worthy of eſteem ſhall diſcover in my labours, the honeſt man and the citizen.

THE

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THE

THE LAW OF NATIONS.

PRELIMINARIES.

Idea and general Principles of the Law of Nations.

§ 1. What is meant by a nation or ſtate.

NATIONS or ſtates are bodies politic, ſocieties of men united together to procure their mutual ſafety and advantage by means of their union.

§ 2. It is a moral perſon.

Such a ſociety has its affairs and intereſts, it deliberates and takes reſolutions in common, and thus becomes a moral perſon, having an underſtanding and a will peculiar to itſelf, and is ſuſceptible of obligations and laws.

To eſtabliſh on a ſolid foundation the obligations and laws of nations, is the deſign of this work. The *law of nations* is *the ſcience of the law ſubſiſting between nations or ſtates, and of the obligations that flow from it.*

§ 3. Definition of the law of nations.

In this treatiſe it will appear, in what manner ſtates, as ſuch, ought to regulate all their actions. We ſhall examine the obligations of a people, both with regard to themſelves and to others, and by that means diſcover the laws reſulting from thoſe obligations. For the law being nothing more than the power of doing whatever is morally poſſible, that is, whatever is of advantage, and conſiſtent with duty; it is evident that the law is derived from duty, or from paſſive obligation; the obligation we are under to act in ſuch a manner. It is therefore neceſſary that a nation ſhould inform itſelf of its obligations, not only to avoid the violation of its duty; but alſo to be able to know with certainty its own rights, or what it may lawfully require from others.

§ 4. In what light nations or ſtates ought to be conſidered.

Nations being compoſed of men naturally free and independent, and who, before the eſtabliſhment of civil ſocieties, live together in the ſtate of nature, nations, or ſovereign ſtates, are to be conſidered as ſo many free perſons, living together in the ſtate of nature.

It is evident from the law of nature, that all men being naturally free and independent, they cannot loſe theſe bleſſings without their own conſent. Citizens cannot enjoy them fully and abſolutely in any ſtate, becauſe they have ſurrendered a part of theſe privileges to the ſovereign. But the body of the nation, the ſtate, remains abſolutely free and independent with reſpect to all men, or to foreign nations, while it does not voluntarily ſubmit to them.

§ 5. To what laws nations are ſubject.

Men being ſubject to the laws of nature, and their union in civil ſociety, not being ſufficient to free them from the obligation of obſerving theſe laws, ſince by this union they do not ceaſe to be men; the entire nation, whoſe common will is only the reſult of the united wills of

of the citizens, remains ſubject to the laws of nature, and is obliged to reſpect them in all its proceedings. And ſince the law ariſes from the obligation, as we have juſt obſerved (§ 3.) the nation has alſo the ſame laws that nature has given to men, for the performance of their duty.

§ 6. In what the law of nations originally conſiſts.

We muſt then apply to nations the rules of the law of nature, in order to diſcover what are their obligations, and what are their laws; conſequently the *law of nations* is originally no more than the *law of nature applied* to nations. But as the application of a rule cannot be juſt and reaſonable, if it be not made in a manner ſuitable to the ſubject; we are not to believe that the law of nations is preciſely, and in every caſe, the ſame as the law of nature, the ſubjects of them only excepted, ſo that we need only ſubſtitute nations for individuals. A ſtate or civil ſociety is a ſubject very different from an individual of the human race: whence, in many caſes, there follow, in virtue of the laws of nature themſelves, very different obligations and rights; for the ſame general rule applied to two ſubjects, cannot produce exactly the ſame deciſions, when the ſubjects are different; ſince a particular rule that is very juſt with reſpect to one ſubject, is not applicable to another ſubject of a very different nature. There are then many caſes in which the law of nature does not determine between ſtate and ſtate, as it would between man and man. We muſt therefore know how to accommodate the application of it to different ſubjects; and it is the art of applying it with a juſtneſs founded on right reaſon, that renders the law of nations a diſtinct ſcience.

§ 7. Definition of the neceſſary law of nations.

We call that the *neceſſary law of nations* that conſiſts in the application of the law of nature to nations. It is *neceſſary*, becauſe nations are abſolutely obliged to obſerve it. This law contains the precepts, preſcribed by the law of nature to ſtates, to whom that

law is not leſs obligatory, than to individuals; becauſe ſtates are compoſed of men, their reſolutions are taken by men, and the law of nature is obligatory to all men, under whatever relation they act. This is the law which Grotius, and thoſe who follow him, call the *internal law of nations*, on account of its being obligatory to nations in point of conſcience. Several term it the *natural law of nations*.

§ 8. It is immutable.

Since then the *neceſſary law of nations* conſiſts in the application of the law of nature to ſtates, and is immutable, as being founded on the nature of things, and in particular on the nature of man; it follows, that the neceſſary law of nations is immutable.

§ 9. Nations can neither change it, nor diſpenſe with the obligations that flow from it.

Whence, as this law is immutable, and the obligations that ariſe from it neceſſary and indiſpenſable; nations can neither make any changes in it by their conventions, diſpenſe with it themſelves, nor reciprocally, with reſpect to each other.

This is the principle by which we may diſtinguiſh lawful conventions and treaties, from thoſe that are not lawful; and innocent, and rational cuſtoms, from thoſe that are unjuſt and cenſurable.

There are things juſt and permitted by the neceſſary law of nations, which ſtates may agree to eſtabliſh between each other, and which they may conſecrate and ſtrengthen by manners and cuſtoms. There are alſo thoſe that are indifferent, which different ſtates may agree to eſtabliſh at pleaſure by treaties, or introduce ſuch cuſtom, or ſuch practice as they ſhall think proper. But all the treaties and all the cuſtoms contrary to what the neceſſary law of Nations preſcribes, or that are ſuch as it forbids, are unlawful. We ſhall hereafter find that they are not always ſuch as are agreeable to the internal law of nature or of conſcience, and that for reaſons which ſhall be given in their proper place, theſe conventions, or theſe treaties, are only valid by the external law. Nations being free and independent,

though

though the actions of one of them are illegal and are condemned by the laws of conſcience, the others are obliged to bear with them, when thoſe actions do not injure their perfect rights. The liberty of one nation will not remain entire, if the others arrogate to themſelves an inſpection into the rules of its conduct. For this muſt be contrary to the law of nature which declares every nation free and independent of others.

§ 10. Of the ſociety eſtabliſhed by nature.

Man is ſo formed by nature, that he cannot ſuffer by himſelf, and he neceſſarily ſtands in need of the aſſiſtance and ſupport of creatures like himſelf, to preſerve and perfect his own being, and to enjoy the life of a rational animal. This is ſufficiently proved by experience. We have inſtances of men nouriſhed among the bears, who had neither a language, nor the uſe of reaſon, and like the beaſts, had only the ſenſual powers. We ſee moreover that nature has refuſed men the natural ſtrength and arms with which ſhe has furniſhed other animals, giving them inſtead of theſe advantages, thoſe of reaſon and ſpeech, or at leaſt the power of acquiring them by a commerce with their fellow beings. Speech enables them to converſe with each other, and enables them to extend, and raiſe to perfection, their reaſon and knowledge; and being thus rendered intelligent, they find a thouſand methods of preſerving themſelves, and ſupplying their wants. Every one alſo becomes ſenſible that he can neither live happily, nor improve himſelf without the aſſiſtance and converſation of others. Since then nature has thus formed mankind, it is a manifeſt proof that ſhe deſigned they ſhould converſe with one another, and grant to each their mutual aid and aſſiſtance.

From hence is deduced that natural ſociety eſtabliſhed among men. The general law of ſociety is, that each ſhould do for others whatever their neceſſities require, and they are capable of doing, without neglecting what they owe to themſelves: a law which all men ought to obſerve in order to live agreeably to their nature, and in conformity

mity to the views of their common Creator: a law that our own ſafety, our happineſs, our moſt precious advantages ought to render ſacred to every one of us. Such is the general obligation that binds us to the obſervance of our duty: let us fulfil it with care, if we would wiſely endeavour to promote our higheſt happineſs.

It is eaſy to conceive the felicity the world would enjoy, were all men willing to obſerve the rule that has been juſt laid down. On the contrary, if every man would think ſolely and immediately for himſelf, and would do nothing for others, all mankind would be very unhappy. Let us then endeavour to promote the happineſs of all; thus all will endeavour to promote ours, and we ſhall eſtabliſh our felicity on the moſt ſolid foundations.

§ 11. And between nations.

The univerſal ſociety of the human race being an inſtitution of nature, that is, a neceſſary conſequence of the nature of man; all men, in whatſoever ſtation they are placed, are obliged to cultivate and diſcharge its duties. They cannot diſpenſe with it by any convention, or private aſſociation. When they unite in civil ſociety in order to form a ſeparate ſtate, or nation, they may juſtly enter into particular engagements towards thoſe with whom they aſſociate themſelves; but they are ſtill under the obligation of performing their duty to the reſt of the human ſpecies. All the difference conſiſts in this, that having agreed to act in common, and having referred their rights, and ſubmitted their will, to the body of the ſociety, in every thing that concerns their common welfare; from thence forward that body, that ſtate, and its conductors, are to fulfil the duties of humanity towards ſtrangers, in every thing that no longer depends on the liberty of private perſons, and the ſtate is particularly to obſerve them with the other ſtates. We have already ſeen (§ 5.) that men, united in ſociety, remain ſubject to the obligations impoſed upon them by human nature: that ſociety, conſidered as a moral perſon, from its having an underſtanding, volition, and ſtrength peculiar to itſelf, is therefore obliged to live

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with other ſocieties, or ſtates, as a man was obliged, before theſe eſtabliſhments, to live with other men, that is, according to the law of the natural ſociety, eſtabliſhed among the human race; obſerving the exceptions that may ariſe from the difference of the ſubjects.

§ 12. What is the end of this ſociety of nations.

As to the end of the natural ſociety eſtabliſhed between all mankind, is their lending their mutual aſſiſtance towards their own perfection and that of the ſtate; and as the nation conſidered as ſo many free perſons who live together in a ſtate of nature, are obliged to cultivate between each other this intercourſe of humanity; the end of the great ſociety eſtabliſhed by nature between all nations is alſo a mutual aſſiſtance for the improvement of themſelves and their ſtate.

§ 13. The general obligation it impoſes.

The firſt general law, which the very end of the ſociety of nations diſcovers, is that each nation ought to contribute all in its power to the happineſs and perfection of others.

§ 14. The explication of this obſervation.

But the duties towards ourſelves, having inconteſtibly the advantage over our duty with reſpect to others, a nation ought in the firſt place, preferably to all other conſiderations, to do whatever it can to promote its own happineſs and perfection. (I ſay whatever it *can*, not only in a *phyſical*, but in a *moral* ſenſe, that is, what it can do lawfully, and conſiſtently with juſtice and integrity.) When therefore it cannot contribute to the welfare of another without doing an eſſential injury to itſelf, the obligation ceaſes on this particular occaſion, and the nation is conſidered as under an impoſſibility of performing that office.

§ 15. The ſecond general law is the liberty and independence of nations.

Nations being free and independent of each other, in the ſame manner as men are naturally free and independent, the ſecond general law of their ſociety is, that each nation ought to be left in the peaceable enjoyment of that liberty it has derived from nature. The natural ſociety of nations cannot ſubſiſt, if the rights each has received from nature, are not reſpected. None would willingly renounce

nounce its liberty, it would rather break off all commerce with thoſe that ſhould attempt to violate it.

§ 16. The effect of this liberty.

From this liberty and independence it follows, that every nation is to judge of what its conſcience demands, of what it can or cannot do, of what is proper or improper to be done; and conſequently to examine and determine whether it can perform any office for another, without being wanting in what it owes to itſelf. In all caſes then, where a nation has the liberty of judging what its duty requires, another cannot oblige it to act in ſuch or ſuch a manner. For the attempting this would be doing an injury to the liberty of nations. A right to offer conſtraint to a free perſon, can only be inveſted in us in ſuch caſes where that perſon is bound to perform ſome particular thing for us, or from a particular reaſon that does not depend on his judgment; or, in a word, where we have a complete authority over him.

§ 17. Diſtinctions between the obligations and laws internal and external, perfect and imperfect.

In order perfectly to underſtand this, it is neceſſary to obſerve, that the obligation, and the right correſpondent to it, or flowing from it, is diſtinguiſhed into *external* and *internal*. The obligation is *internal*, as it binds the conſcience, and as it comprehends the rules of our duty: it is *external*, as it is conſidered relatively to other men, and as it produces ſome right between them. The internal obligation is always the ſame in nature, though it varies in degree: but the external obligation is divided into *perfect* and *imperfect*, and the right that reſults from it is alſo *perfect* and *imperfect*. The *perfect right* is that to which is joined the right of conſtraining thoſe who refuſe to fulfil the obligation reſulting from it; and the *imperfect* right is that unaccompanied by this right of conſtraint. The *perfect obligation* is that which produces the right of conſtraint; the *imperfect* gives another only a right to demand.

It may now be comprehended without difficulty, why the right is always imperfect, when the obligation which anſwers to it, depends on the judgment of another. For

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in this caſe, was there a right of conſtraint, it would no longer depend on the other to reſolve what ought to be done in order to obey the laws of conſcience. Our obligation is always imperfect in relation to another, when the deciſion of what we have to do is reſerved to ourſelves, and this deciſion is reſerved to us on all occaſions where we have a right to be free.

§ 18. The equality of nations.

Since men are naturally equal, and their rights and obligations are the ſame, as equally proceeding from nature, nations compoſed of men conſidered as ſo many free perſons, living together in the ſtate of nature, are naturally equal, and receive from nature the ſame obligations and rights. Power or weakneſs does not in this reſpect produce any difference. A dwarf is as much a man as a giant; a ſmall republic is as much a ſovereign ſtate as the moſt powerful kingdom.

§ 19. An effect of this equality.

From a neceſſary conſequence of this equality, what is permitted to one nation, is permitted to all; and what is not permitted to one, is not permitted to any other.

§ 20. Each has authority over its own actions when they do not injure the perfect rights of others.

A nation has then a right to perform what actions it thinks fit, both when they do not concern the proper and perfect rights of any other, and when it is bound to it only by an *internal*, without any *perfect external* obligation, and is under no *external perfect* obligation. If it makes an ill uſe of its liberty, it offends; but others ought to ſuffer it to do ſo, having no right to command it to do otherwiſe.

§ 21. The foundation of the voluntary law of nations.

Nations being free, independent and equal, and having a right to judge according to the dictates of conſcience, of what is to be done in order to fulfil its duties; the effect of all this is, the producing, at leaſt externally, and among men, a perfect equality of rights between nations, in the adminiſtration of their affairs, and the purſuit of their pretenſions, without regard to the intrinſic juſtice of their conduct, of which others have no right to form a definitive judgment; ſo that what is permitted in one, is alſo permitted in the other, and they ought to be conſidered in human ſociety as having an equal right.

Every

Every one, in fact, pretends to have juſtice on his ſide in the difference that may ariſe, and neither one nor the other ought to intereſt itſelf in forming a judgment of the diſputes of other nations. The nation that has acted wrong, has offended againſt its conſcience; but as it may do whatever it has a right to perform, it cannot be accuſed of violating the laws of ſociety.

It is therefore neceſſary, on many occaſions, that nations ſhould ſuffer certain things to be done, that are very unjuſt and blameable in their own nature, becauſe they cannot oppoſe it by open force, without violating the liberty of ſome particular ſtate, and deſtroying the foundation of natural ſociety. And ſince they are obliged to cultivate that ſociety, it is rightly preſumed, that all nations have conſented to the principle we have juſt eſtabliſhed. The rules that flow from this principle, from what Mr. WOLFF calls *the voluntary law of nations*; and nothing prevents our uſing the ſame term, though we have imagined that we ought to deviate from that great man in our manner of eſtabliſhing the foundation of thoſe laws.

§ 22. The law of nations againſt the infractors of the law of nations.

The laws of natural ſociety are of ſuch importance to the ſafety of all ſtates, that if they accuſtom themſelves to trample them under their feet, no people can flatter themſelves with the hopes of ſelf-preſervation, and of enjoying tranquillity at home, whatever wiſe, juſt and moderate meaſures they may purſue. Now all men and all ſtates have a perfect right to thoſe things that are neceſſary for their preſervation; ſince this right is equivalent to an indiſpenſable obligation. All nations have then a right to repel by force, what openly violates the laws of the ſociety which nature has eſtabliſhed among them, or that directly attacks the welfare and ſafety of that ſociety.

§ 23. The rule of this law.

But care muſt be taken not to extend this law to the prejudice of the liberty of nations. All are free and independent, but obliged to preſerve the laws of ſociety which nature has eſtabliſhed among them, and ſo far obliged, that others have a right to repreſs that which violates theſe laws;

laws; all together have not therefore any authority over the conduct of any one, farther than the intereſt of the natural ſociety is concerned. The general and common law of nations, with reſpect to the conduct of all ſovereign ſtates, ought to be meaſured by the end of the aſſociation that ſubſiſts between them.

§ 24. The conventional law of nations, or the law of treaties.

The ſeveral engagements into which nations may enter, produce a new kind of the law of nations called *conventional or of treaties*. As it is evident that a treaty binds only the contracting parties; the conventional law of nations, is not an univerſal, but a particular law. All that can be done on this ſubject in a treatiſe on the law of nations, is therefore to give the general rules that ought to be obſerved by nations in relation to their treaties. The particulars of the different agreements, relate to what paſſes between certain nations; but the law and the obligations reſulting from it, is matter of fact, and belongs to hiſtory.

§ 25. The cuſtomary law of nations.

Certain maxims, and cuſtoms conſecrated by long uſe, and obſerved by nations between each other as a kind of law, from the *cuſtomary law of nations*, or the *cuſtom of nations*. This law is founded on a tacit conſent, or if you will, on a tacit convention of the nations that obſerve it with reſpect to each other. Whence it appears that it is only binding to thoſe nations that have adopted it, and that it is not univerſal, any more than *conventional laws*. It muſt be here alſo obſerved of this *cuſtomary law*, that the particulars relating to it, do not belong to a ſyſtematic treatiſe on the law of nations, but that we ought to confine ourſelves to the giving a general theory of it; that is, to the rules which here ought to be obſerved, as well with reſpect to its effects, as in relation to the matter itſelf: and in this laſt reſpect, theſe rules will ſerve to diſtinguiſh, the lawful and innocent cuſtoms, from thoſe that are unjuſt and illegal.

§ 26. The general rule of this law.

When a cuſtom is generally eſtabliſhed, either between all the polite nations in the world, or only between thoſe, of

of a certain continent, as of Europe, for example; or thefe who have a more frequent correfpondence; if that cuftom is in its own nature indifferent, and much more, if it be a wife and ufeful one, it ought to be obligatory to all thofe nations who are confidered as having given their conſent to it. And they are bound to obſerve it with reſpect to each other, while they have not expreſsly declared, that they will not adhere to it. But if that cuſtom contains any thing unjuſt or illegal, it is of no force; and every nation is under an obligation to abandon it, nothing being able to oblige or permit a nation to violate a natural law.

§ 27. Of the poſitive law of nations.

Theſe three kinds of the law of nations, *voluntary*, *conventional*, and *cuſtomary*, together compoſe the *poſitive law of nations*. For they all proceed from the violation of nations; the *voluntary law*, from their preſumed conſent; the *conventional law* from an expreſs conſent; and the *cuſtomary law*, from a tacit conſent: and as there can be no other manner of deducing any law from the will of nations, there are only theſe three kinds of the *poſitive law of nations*.

We have carefully diſtinguiſhed from them the *natural* or *neceſſary* law of nations; without, however, treating of them ſeparately. But after having eſtabliſhed, with reſpect to each, what the law neceſſarily preſcribes; we ſhall at length add, how and in what manner the deciſions of the voluntary law ought to be modified, or wich is the ſame thing in other terms, we ſhall explain, how, in virtue of the liberty of nations, and the rules of natural ſociety, the *external law*, that ought to be obſerved among them, differs in certain inſtances from the maxims of the *internal law*, which is always obligatory with reſpect to conſcience. As to the laws introduced by treaties, or by cuſtom, there is no room to fear, that any one will confound them with the natural law of nations. They form that ſpecies of the law of nations which authors have diſtinguiſhed by the name of *arbitrary*.

To

§ 28. A general maxim with regard to the uſe of the neceſſary and voluntary law.

To give at preſent a general direction, in relation to the diſtinction between *neceſſary* and *voluntary laws*, we ſhall obſerve, that the *neceſſary law* being always obligatory with reſpect to conſcience, a nation ought never to loſe ſight of it, when it deliberates on the part it is to take, in order to fulfil its duty; but when it is requiſite to examine, what it may require from other ſtates, it ought to conſult the *voluntary law*, the maxims of which are conſecrated to the ſafety and advantage of univerſal ſociety.

THE

THE LAW OF NATIONS.

BOOK I.

Of Nations conſidered in themſelves.

CHAP. I.

Of Nations or ſovereign States.

§ 1. Of the ſtate of ſovereignty.

A NATION or a ſtate is, as has been ſaid at the beginning of this work, a body politic, or a ſociety of men united together to promote their mutual ſafety and advantage by means of their union.

From the very deſign that induces a number of men to form a ſociety that has its common intereſts, and ought to act in concert, it is neceſſary that there ſhould be eſtabliſhed

ed a public authority, to order and direct what ought to be done by each in relation to the end of the association. This political authority is the ſovereignty, and he, or they who are inveſted with it are the ſovereign.

§ 2. The authority of the body politic over the members.

It is evident from the very act of the civil or political aſſociation, that each citizen ſubjects himſelf to the authority of the entire body, in every thing that relates to the common welfare. The authority of all over each member, therefore eſſentially belongs to the body politic, or to the ſtates; but the exerciſe of that authority may be placed in different hands according as the ſociety ſhall ordain.

§ 3. Of the ſeveral kinds of government.

If the body of the nation keeps in its own hands the empire, or the right of command, it is a popular government, a *democracy*; if it refers it to a certain number of citizens, to a ſenate, it eſtabliſhes a republic, an *ariſtocracy*; in ſhort, if it confides the government to a ſingle perſon, the ſtate becomes a *monarchy*.

Theſe three kinds of government may be variouſly combined and modified. We ſhall not here enter into the particulars; this ſubject belonging to the *public univerſal law*: it is ſufficient, in this work, to eſtabliſh the general principles neceſſary for the deciſion of thoſe diſputes that may ariſe between nations.

§ 4. What are ſovereign ſtates.

Every nation that governs itſelf, under what form ſoever, without any dependence on a foreign power, is a *ſovereign ſtate*. Its rights are naturally the ſame as thoſe of any other ſtate. Such are moral perſons who live together in a natural ſociety, under the law of nations. To give a nation a right to make an immediate figure in this grand ſociety, it is ſufficient if it be really ſovereign and independent; that is, it muſt govern itſelf by its own authority and laws.

§ 5. Of ſtates bound by unequal alliance.

We ought therefore to reckon in the number of ſovereigns, thoſe ſtates that have bound themſelves to another more powerful, by an *unequal alliance*, in which, as Ariſtotle ſays, to the more powerful is given more honour, and to the weaker, more aſſiſtance.

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The conditions of theſe unequal alliances may be infinitely varied. But whatever they are, provided the inferior ally reſerves to itſelf the ſovereignty, or the right of governing its own body, it ought to be conſidered as an independent ſtate, that keeps up correſpondence with others under the authority of the law of nations.

§ 6. Or by treaties of protection.

Conſequently a weak ſtate that, in order to provide for its ſafety, places itſelf under the protection of a more powerful one, and from gratitude, enters into engagements to perform ſeveral offices equivalent to that protection, without in the leaſt ſtripping itſelf of the right of government and ſovereignty; that ſtate, I ſay, does not ceaſe on this account, to be placed among the ſovereigns who acknowledge no other law, than that of nations.

§ 7. Of tributary ſtates.

There is no more difficulty with reſpect to tributary ſtates: for though tribute paid to a foreign power, in ſome degree diminiſhes the dignity of the ſtates, from its being a confeſſion of their weakneſs; yet it ſuffers their ſovereignty to ſubſiſt entire. The cuſtom of paying tribute was formerly very common; the weakeſt purchaſing by that means of him who was more powerful a freedom from vexations; or ſecuring at this expence, his protection, without ceaſing to be ſovereigns.

§ 8. Of feudatory ſtates.

The Germanic nations have introduced another cuſtom, that of requiring homage from a ſtate either vanquiſhed, or too weak to make reſiſtance. Sometimes a prince has even given ſovereignties in fief, and ſovereigns have voluntarily rendered themſelves feudatories to others.

When the homage leaves independency and ſovereign authority in the adminiſtration of the ſtate, and only means certain duties to the lord of the fief, or even a mere honorary acknowledgment, it does not prevent the ſtate or the feudatory prince, being ſtrictly ſovereign. The king of Naples pays homage for his kingdom to the pope; and yet is nevertheleſs reckoned among the principal ſovereigns of Europe.

§ 9. Of two ſtates ſubject to the ſame prince.

Two ſovereign ſtates may alſo be ſubject to the ſame prince, without any dependence on each other, and each may retain all its national rights free and ſovereign; the king of Pruſſia is ſovereign prince of Neufchatel in Switzerland, without that principality being in any manner united to his other dominions; ſo that the Neufchatelians, in virtue of their franchiſes, may ſerve a foreign power at war with the king of Pruſſia, provided that the war be not on account of that principality.

§ 10. Of a ſtate forming a federal republic.

In ſhort, ſeveral ſovereign and independent ſtates may unite themſelves together by a perpetual confederacy, without each in particular ceaſing to be a perfect ſtate. They will form together a federal republic: the deliberations in common will offer no violence to the ſovereignty of each member, though they may, in certain reſpects, put ſome conſtraint on the exerciſe of it, in virtue of voluntary engagements. A perſon does not ceaſe to be free and independent, when he is obliged to fulfil the engagements into which he has very willingly entered.

Such were formerly the cities of Greece; ſuch are at preſent the Seven United Provinces of the Netherlands, and ſuch the members of the Helvetic body.

§ 11. Of a ſtate that has paſſed under the dominion of another prince.

But a people, that has paſſed under the dominion of another, can no longer form a ſtate, and in a direct manner make uſe of the law of nations. Such were the people and kingdoms which the Romans rendered ſubject to their empire; the moſt, even of thoſe whom they honoured with the name of friends and allies, no longer formed ſtates. Within themſelves they were governed by their own laws and magiſtrates; but without, they were in every thing obliged to follow the orders of Rome; they dared not of themſelves make either war or an alliance, and could not treat with nations.

§ 12. The ſubjects of this treatiſe.

The law of nations is the law of ſovereigns: ſtates free and independent are moral perſons, and their laws and obligations we are to eſtabliſh in this treatiſe.

CHAP.

CHAP. II.

General Principles of the Duties of a Nation towards itſelf.

§ 13. A nation ought to act agreeably to its nature.

IF the rights of a nation ſpring from its obligations, it is principally from thoſe that relate to itſelf. Its duties towards others, alſo depend very much on thoſe towards itſelf, by which a nation ought to regulate and meaſure its conduct. As we are then to treat of the obligations and rights of nations, order demands that we ſhould begin with eſtabliſhing what each owes to its own welfare.

The general and fundamental rule of the duties towards ourſelves is, that every moral being ought to live in a manner conformable to nature, *naturæ convenienter vivere*. A nation is a being determined by its eſſential properties, that has its own nature, and can act in conformity to it. There are then the actions of a nation as ſuch, wherein it is concerned in its national character, and which are either ſuitable or oppoſite to what conſtitutes a nation; ſo that it is not a matter of indifference whether it performs ſome of theſe actions, and omits others. In this reſpect the Law of Nature preſcribes its duties. We ſhall ſee in this firſt book, what conduct a nation ought to obſerve, in order that it may not be wanting to itſelf. But we ſhall firſt ſketch out a general idea of this ſubject.

§ 14. Of the preſervation and perfection of a nation.

He who no longer exiſts, can have no duties to perform: a moral being is charged with obligations to himſelf with a view to his perfection and happineſs: for to preſerve and to perfect his own nature is the ſum of all his duties to himſelf.

The preſervation of a nation conſiſts in the duration of the political aſſociation of which it is formed. If a period

is put to this aſſociation, the nation or ſtate no longer ſubſiſts, though the individuals that compoſed it, ſtill exiſt.

The perfection of a nation is found in what renders it capable of obtaining the end of civil ſociety: and a nation is in a perfect ſtate, when nothing neceſſary is wanting to arrive at that end. We know that the perfection of a thing in general conſiſts, in a perfect concord of all that conſtitutes the thing what it is, tending to the ſame end. A nation being a multitude of men united together in civil ſociety, if in that multitude all conſpire to obtain the end propoſed in forming a civil ſociety, the nation is perfect; and it is more or leſs ſo, according as it approaches more or leſs to that perfect agreement. In the ſame manner its external ſtate will be more or leſs perfect, according as it concurs with the intrinſic perfection of the nation.

§ 15. What is the end of civil ſociety.

The end of civil ſociety is procuring for the citizens whatever their neceſſities require, the conveniencies and accommodations of life, and in general, whatever conſtitutes happineſs; with the peaceful poſſeſſion of property, a method of obtaining juſtice with ſecurity; and, in ſhort, a mutual defence againſt all violence from without.

It is now eaſy to form a juſt idea of the perfection of a ſtate or nation, for every thing muſt conſpire to promote theſe ends.

§ 16. A nation is under an obligation to preſerve itſelf

In the act of aſſociation, in virtue of which a multitude of men form together a ſtate or nation, each individual has entered into engagements with all, to procure the common welfare; and all have entered into engagements with each individual to facilitate for him the means of ſupplying his neceſſities, and to protect and defend him. It is manifeſt that theſe reciprocal engagements can no otherwiſe be fulfilled than by maintaining the political aſſociation. The entire nation is then obliged to maintain that aſſociation: and as in its duration the preſervation of the nation conſiſts, it follows from thence that every

nation

nation is obliged to perform the duty of ſelf-preſervation.

This obligation, ſo natural to the creatures of God, is not derived to nations immediately from Nature, but from the agreement by which civil ſociety is formed: it is therefore not abſolute, but conditional; that is, it ſuppoſes an human act, a part or agreement of ſociety: and as the parts may be diſſolved by common conſent of the parties, if the individuals that compoſe a nation unanimouſly conſent to break the knot that binds them, they may be permitted to do it, and thus to deſtroy the ſtate or nation; but they doubtleſs cannot innocently do it, if they take this ſtep without juſt and weighty reaſons; for civil ſocieties are approved by the Law of Nature, which recommends them to man, as the true means of ſupplying all their wants, and of advancing effectually towards their proper perfection. Moreover civil ſociety is ſo uſeful, ſo neceſſary even to all citizens, that it may well be conſidered as morally impoſſible for them to conſent unanimouſly to break it without neceſſity. But what citizens may, or ought to do, what the majority of them may reſolve in certain caſes of neceſſity, or in preſſing exigencies; are queſtions that will be treated of elſewhere: they cannot be ſolidly determined without ſome principles, which we have not yet eſtabliſhed. It is ſufficient for the preſent that we have in general proved, that while the political ſociety ſubſiſts, the whole nation is obliged to endeavour to preſerve it.

§ 17. And to preſerve its members.

If a nation is obliged to preſerve itſelf, it is not leſs obliged carefully to preſerve all its members. The nation owes this to itſelf; ſince the loſs of even one of its members weakens it, and is injurious to its own preſervation. It owes this alſo to the members in particular in conſequence of the very act of aſſociation; for thoſe who compoſe a nation are united for their defence and common

common advantage; and none can justly be deprived of this union, and of the advantages which flow from it, while he on his side fulfils the conditions.

The body of a nation cannot then abandon a province, a town, or even a particular person, who has done his part, unless obliged to it from necessity, or unless it is made necessary by the strongest reasons founded on the public safety.

§ 18. A nation has a right to every thing necessary for its preservation.

Since then a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation, for the Law of Nature gives us a right to every thing, without which we could not fulfil our obligation; otherwise it would oblige us to do impossibilities; or rather would contradict itself in prescribing a duty, and prohibiting at the same time the only means of fulfilling it. It will doubtless be here understood, that these means ought not to be unjust in themselves, and absolutely forbidden by the Law of Nature. As it is impossible that it should ever permit the use of such means; if on a particular occasion no other present themselves for fulfilling a general obligation, the obligation ought to cease in that particular instance, as impossible, and consequently void.

§ 19. It ought to avoid every thing that might occasion its destruction.

By an evident consequence from what has been said, a nation ought carefully to avoid, as much as possible, whatever may cause its destruction, or that of the state, which is the same thing.

§ 20. Of its right to every thing that may promote it.

A nation or state has a right to every thing that can secure it from such a threatening danger, and to keep at a distance whatever is capable of causing its ruin; and that from the very same reasons that establish its right to the things necessary to its preservation.

§ 21. A nation ought to perfect itself and the state.

The second general duty of a nation towards itself, is to endeavour after its perfection and that of the state. It is this double perfection that renders a nation capable of attaining the end of civil society; it would be absurd

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to unite in ſociety, and yet not to endeavour to promote the end of that union.

Here the entire body of the nation, and each citizen in particular find themſelves bound by a double obligation, the one immediately proceeding from nature, and the other reſulting from their reciprocal engagements. Nature lays an obligation upon all mankind to labour after their own perfection, and by that means to labour after that of civil ſociety, which could not fail of being very flouriſhing, were it compoſed of none but good citizens. But man, finding in a well-regulated ſociety the moſt powerful ſuccours to enable him to fulfil the taſk which nature impoſes upon him in relation to himſelf, to induce him to become better, and conſequently more happy; he is doubtleſs obliged to contribute all in his power to render that ſociety more perfect.

All the citizens who form a political ſociety, reciprocally engage to advance the common welfare, and to promote as much as they can, the advantage of each member. Since then the perfection of the ſociety is what renders it proper to ſecure equally the happineſs of the body and that of the members; to endeavour after this perfection is the grand object of the engagements and duties of a citizen. This is more particularly the duty of the whole body in all their deliberations in common, and in every thing they do as a body.

§ 22. And to avoid every thing contrary to its perfection.

A nation therefore ought to prevent, and carefully to avoid whatever may hinder the perfection of the people, and that of the ſtate, or retard the progreſs either of the one or the other.

§ 23. The rights it obtains from thoſe obligations.

We may then conclude, as we have done above in regard to the preſervation of a ſtate, (§ 18.) that a nation has a right to every thing without which it cannot obtain the perfection of the members and of the ſtate,

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ſtate, or prevent and repel whatever is contrary to this double perfection.

§ 24. Examples.

The Engliſh furniſh us with an example of this kind highly worthy of attention. That illuſtrious nation diſtinguiſhes itſelf in a glorious manner by its application to every thing that can render the ſtate the moſt flouriſhing. An admirable conſtitution there places every citizen in a ſituation that enables him to contribute to this great end, and every where diffuſes a ſpirit of true patriotiſm, which is zealouſly employed for the public welfare. We there ſee mere citizens form conſiderable enterprizes, in order to promote the glory and welfare of the nation. And while a bad prince would be abridged of his power, a King, endowed with wiſdom and moderation, finds the moſt powerful ſuccours to give ſucceſs to his great deſigns. The nobles and the repreſentatives of the people form a band of confidence between the monarch and the nation, and concur with him in every thing that concerns the public welfare, eaſe him in part of the burden of government; confirm his power, and render him an obedience the more perfect, as it is voluntary. Every good citizen ſees that the ſtrength of the ſtate is really the welfare of all, and not that of a ſingle perſon. Happy conſtitution! which they did not ſuddenly obtain; it has coſt rivers of blood; but they have not purchaſed it too dear. May luxury, that peſt ſo fatal to the manly and patriotic virtues, that miniſter of corruption ſo dangerous to liberty, never overthrow a monument that does ſo much honour to human nature; a monument capable of teaching Kings, how glorious it is to rule over a free people!

There is another nation illuſtrious by its valour and its victories. It has a multitude of nobility diſtinguiſhed by their bravery; its dominions, which are of vaſt extent,

extent, might render it reſpectable throughout all Europe, and in a ſhort time it might be in a flouriſhing ſituation. But its conſtitution oppoſes this, and the attachment of the nobles to that conſtitution, is ſuch, that there is no room to expect a proper remedy will ever be applied. In vain might a magnanimous king, raiſed by his virtues above the purſuits of ambition and injuſtice, form the moſt ſalutary deſigns for promoting the happineſs of his people; in vain might he cauſe them to be approved by the moſt ſenſible, and even the greateſt part of the nation: a ſingle deputy, obſtinate or corrupted by a foreign power, might put a ſtop to all, and break the wiſeſt and moſt neceſſary meaſures. From an exceſſive jealouſy of its liberty, the nation has taken ſuch precautions as muſt neceſſarily place it out of the power of the king to make any attempts on the liberties of the public. But do not we ſee that theſe meaſures exceed the end; that they would tie the hands of the moſt juſt and wiſe prince, and deprive him of the means of ſecuring the public freedom from the enterprizes of foreign powers, and of rendering the nation rich and happy? Do we not ſee that the nation itſelf is placed out of the power of acting, and that its councils are committed to the caprice or treachery of a ſingle miniſter?

§ 25. A nation ought to know itſelf.

We ſhall therefore conclude this chapter, with obſerving, that a nation ought to know itſelf. Without this knowledge it cannot make any ſucceſsful endeavours after its own perfection. It ought to have a juſt idea of its ſtate, to enable it to take the moſt proper meaſures; to know the progreſs already made, and thoſe that are ſtill to be put in execution; what is good, and what is defective in the conſtitution, in order to preſerve the one, and correct the other. Without this knowledge a nation will act at random; and often take the falſeſt meaſures. It will think it acts with great wiſdom in imitating

imitating the conduct of a people reputed wise, and not perceive that such regulations, and such proceedings as are salutary to one state are often pernicious to another. Every thing ought to be conducted according to its nature. Nations cannot be well governed without such regulations as are suitable to their respective characters, and in order to this they ought to be known.

CHAP. III.

Of the Constitution of a State, and the Duties and Laws of the Nation in this Respect.

WE were unable to avoid in the first chapter anticipating something of this.

§ 26. Of public authority.

We have seen already that every political society must necessarily establish public authority, to regulate common affairs, to prescribe to each individual the conduct he ought to observe with a view to the public welfare, and the means of procuring obedience. This authority essentially belongs to the body of the society; but it may be executed by very different methods, and every society has a right to choose that most agreeable to it.

§ 27. What is the constitution of a state.

The fundamental regulation that determines the manner in which the public authority is to be executed, is what forms the *constitution of the state*. In this is seen the form by which the nation acts in quality of a body-politic: how and by whom the people ought to be governed; and what are the laws and duties of the governors. This constitution is in fact nothing more, than

than the eſtabliſhment of the order in which a nation propoſes to labour in common for obtaining thoſe advantages with a view to which the political ſociety was eſtabliſhed.

§ 28. The nation ought to chooſe the beſt.

The perfection of a ſtate, and its aptitude to fulfil the ends propoſed by the ſociety, muſt then depend on the conſtitution; conſequently it is of the greateſt moment to a nation that forms a political ſociety; and its firſt and moſt important duty towards itſelf, is to chooſe the beſt conſtitution poſſible, and that moſt ſuitable to its circumſtances. When it makes this choice, it lays the foundation of its preſervation, ſafety, perfection, and happineſs: it cannot take too much care in placing theſe on a ſolid baſis.

§ 29. Of the political, fundamental, and civil laws.

The laws are regulations eſtabliſhed by public authority to be obſerved in ſociety. All theſe ought to relate to the welfare of the ſtate and of the citizens. The laws made directly with a view to the public welfare, are the *Political Laws*: and in this claſs, thoſe that concern the body itſelf, and the being of the ſociety, the form of government, the manner in which the public authority is to be exerted; and thoſe, in a word, which together form the conſtitution of the ſtate, are the *Fundamental Laws*.

The *Civil Laws* are thoſe that regulate the conduct and behaviour of the citizens among themſelves.

Every nation that would not be wanting to itſelf, ought to apply its utmoſt care in eſtabliſhing theſe, and principally in its fundamental laws; to eſtabliſh them, I ſay, with wiſdom, in a manner ſuitable to the genius of the people and to all the circumſtances in which they may be placed; they ought to determine them, and make them known with plainneſs and preciſion; to the end that they may remain ſtable, that their puniſhments may not be eluded, and, that they may create, if poſſible, no *diſſention*; that on the one hand,

hand, he or they to whom the exercise of the sovereign power is committed, may obtain confidence and respect; and the citizens, on the other, know equally their duty, and their privileges. It is not our business particularly to consider, what ought to be this constitution, and these laws; this discussion belongs to public laws and politics. Besides, the laws and constitutions of different states must necessarily vary according to the disposition of the people, and other circumstances. In the Law of nations we must adhere to generals. We here consider the duty of nations towards themselves, principally to determine the conduct that ought to be observed in that great society which Nature has established among all people. These duties give them rights, that serve as a rule to establish what may be required from other nations, and reciprocally what others may require from them.

§ 30. Of the support of the constitution and obedience to the laws.

The constitution and its laws are the basis of the public tranquillity, the firmest support of the public authority, and pledge of the liberty of the citizens. But this constitution is a vain phantom, and the best laws are useless if they are not religiously observed: The nation ought then to watch very attentively, in order to render them equally respected by those who govern, and by the people destined to obey. To attack the constitution of the state, and to violate its laws, is a capital crime against society, and if those guilty of it are invested with authority, they add to this crime a perfidious abuse of the power with which they are intrusted. The nation ought constantly to suppress these abuses with its utmost vigour and vigilance, as the importance of the case requires. It is very uncommon to see the Laws and Constitution of a state openly and boldly opposed: it is against silence and slow attacks that a nation ought to be particularly on its guard. Sudden revolutions strike the imaginations of men:

we write hiſtories of them; and unfold their cauſes; but we neglect the changes that inſenſibly happen, by a long train of ſteps that are but little obſerved. It would be doing an important ſervice to nations to ſhew from hiſtory, how ſtates have entirely changed their nature, and loſt their original conſtitution. This would awaken the attention of the people, and from thence forward, filled with this excellent maxim, no leſs eſſential in politics than in morals, *Principiis obſta*, they would no longer ſhut their eyes againſt innovations, which though inconſiderable in themſelves, may ſerve as ſteps to mount to higher and more pernicious enterprizes.

§ 31. The rights of a nation with reſpect to its conſtitution and government.

The conſequences of a good or bad conſtitution being of ſuch importance, and the nation finding itſelf ſo ſtrictly obliged to procure, as well as it is able, the beſt and moſt convenient, it has a right to every thing without which it could not fulfil this obligation (§ 18.). It is then manifeſt that a nation has a right to form, maintain, and perfect its conſtitution, and to regulate at pleaſure every thing relating to the government, while no perſon can have a juſt right to hinder it. Government is eſtabliſhed only for the ſake of the nation, with a view to its ſafety and happineſs.

§ 32. It may reform the government.

If any nation is diſſatisfied with the public adminiſtration, it may reduce it to order, and reform the government. But obſerve, that I here ſay the nation; for I am very far from intending to authorize any malecontents or buſy perſons to give diſturbance to their governors, by exciting murmurs and ſeditions. None but the body of a nation have a right, to call to account thoſe at the helm who abuſe their power. When the nation is ſilent and obeys, the people are conſidered as approving the conduct of their ſuperiors, or at leaſt of finding it ſupportable, and it is not the buſineſs of a ſmall number

number of citizens to put the ſtate in danger, under the pretence of reforming it.

§ 33. And change the conſtitution.

In virtue of the ſame principles, it is certain that if the nation is uneaſy under its conſtitution, it has a right to change it.

There can be no difficulty in this, in caſe the whole nation be unanimouſly inclined to make this change: It is aſked, what ought to be done if the people are divided? According to the common method of ſtates, the opinion of the majority muſt paſs without diſpute for that of the whole nation; otherwiſe it would be impoſſible for the ſociety ever to take any reſolution. It appears then from the ſame reaſon, that a nation may change the conſtitution of the ſtate, by a majority of votes, and whenever there is nothing in this change that can be conſidered as contrary to the act of the civil aſſociation, or to the intention of thoſe united under it, all are bound to conform to the reſolution of the majority. But if the queſtion be, to quit a form of government, to which alone it appeared that the people were willing to ſubmit, on their entering into the bonds of ſociety; if the greateſt part of a free people, after the example of the Jews, in the time of Samuel, are weary of liberty, and reſolved to ſubmit to the authority of an abſolute prince, the citizens more jealous of that privilege, ſo invaluable to thoſe who have taſted it, though obliged to ſuffer the majority to do as they pleaſe are under no obligation at all to ſubmit to the new government: they may leave a ſociety that ſeems to have diſſolved itſelf, in order to be united under another form; and have a right to retire elſewhere, to ſell their lands, and take with them all their effects.

§ 34. Of the legiſlative power, and whether it can change the conſtitution.

A very important queſtion here preſents itſelf. It eſſentially belongs to the ſociety to make Laws both in relation to the manner in which it deſires to be governed,

and

and to the conduct of the citizens: This is called the *Legiſlative Power*. The nation may intruſt the exerciſe of it to the prince, or to an aſſembly; or to that aſſembly and the prince jointly; who have then a right of making new, and abrogating old laws. It is here demanded whether, if their power extends ſo far as to the fundamental laws, they may change the conſtitution of the ſtate? The principles we have laid down lead us to decide this point with certainty, that the authority of theſe legiſlators does not extend ſo far, and that they ought to conſider the fundamental laws as ſacred, if the nation has not, in very expreſs terms, given them the power to change them. For the conſtitution of the ſtate ought to be fixed: and ſince that was firſt eſtabliſhed by the nation, which afterwards truſted certain perſons with the legiſlative power, the fundamental laws are excepted from their commiſſion. It appears that the ſociety had only reſolved to make proviſion for the ſtate's being always furniſhed with laws ſuited to particular conjunctures, and gave the legiſlature, for that purpoſe, the power of abrogating the ancient civil and political laws, that were not fundamental, and of making new ones: but nothing leads us to think that it was willing to ſubmit the conſtitution itſelf to their pleaſure. In ſhort, theſe legiſlators derive their power from the conſtitution, how then can they change it, without deſtroying the foundation of their authority? By the fundamental laws of England the two houſes of parliament in concert with the king, exerciſe the legiſlative power: but if the two houſes ſhould reſolve to ſuppreſs themſelves, and to inveſt the king with the full and abſolute government; certainly the nation would not ſuffer it. And who can preſume to ſay, that they would not have a right to oppoſe it? But if the parliament entered into a debate on making ſo conſiderable a change, and the whole

whole nation was voluntarily ſilent upon it, this would be conſidered as an approbation of the act of its repreſentatives.

§ 35. The nation ought not to do it without great precaution.

But in treating here of the change of the conſtitution, we treat only of a right, what is expedient belongs to politics. We ſhall therefore only obſerve in general, that great changes in a ſtate being delicate and very dangerous affairs, and that frequent changes being in their own nature prejudicial, a people ought to be very circumſpect in doing it, and never be inclined to make innovations without the moſt preſſing reaſons, or an abſolute neceſſity. The ſpirit of inconſtancy which prevailed among the Athenians, was always contrary to the happineſs of that republic, and was at length fatal to that liberty of which they were ſo jealous without knowing how to enjoy it.

§ 36. It is to judge of all diſputes relating to the government.

We may conclude from what has been ſaid (§ 31), that if there ariſes any diſputes in a ſtate on the fundamental laws, on the public adminiſtration, or on the prerogatives of the different powers of which it is compoſed, it is the buſineſs of the nation alone to judge and determine them, in conformity to its political conſtitution.

§ 37. No foreign power has a right to interfere.

In ſhort, all theſe affairs being ſolely a national concern, no foreign power has a right to interfere in them; nor ought to do it otherwiſe than by its good offices, unleſs that ſtate be deſired, or called by particular reaſons. If any intrude into the domeſtic affairs of another nation, and attempt to influence its deliberations, they do it an injury.

CHAP.

CHAP. IV.

Of the Sovereign, his Obligations and Prerogatives.

§ 38. Of the ſovereign.

THE reader cannot expect to find here a long deduction of the prerogatives of ſovereignty, and the duties of a prince. Theſe are to be found in treatiſes on the public law. We only propoſe in this chapter to ſhew in conſequence of the grand principles of the law of nations, what a ſovereign is, and to give a general idea of his obligations and prerogatives.

We have ſaid that the *ſovereignty* is that public authority which commands in civil ſociety, and orders and directs what each is to perform, to obtain the end of its inſtitution. This authority belonged originally and eſſentially to the body of the ſociety, to which each member ſubmitted, and ceded the rights he received from nature, to conduct himſelf in every thing as he pleaſed, according to the dictates of his own underſtanding, and to do himſelf juſtice. But the body of the ſociety does not always retain this ſovereign authority: it frequently truſts it to a ſenate, or to a ſingle perſon. This ſenate, or this perſon is then the ſovereign.

§ 39. It is ſolely eſtabliſhed for the ſafety and advantage of ſociety.

It is evident that men form a political ſociety, and ſubmit to laws, ſolely for their own advantage and ſafety. The ſovereign authority is then eſtabliſhed, only for the common good of all the citizens, and it would be abſurd to think that it could change its nature on its paſſing into the hands of a ſenate, or a monarch. Flattery therefore cannot diſown, without rendering itſelf equally ridiculous and odious, that the ſovereign is only eſtabliſhed for the ſafety of the ſtate, and the advantage of ſociety.

A good prince, a wiſe conductor of ſociety, ought to have his mind impreſſed with this great truth, that the ſovereign power is ſolely intruſted with him for the ſafety of the ſtate, and the happineſs of all his people; that he is not permitted to ſeek himſelf in the adminiſtration of affairs, to propoſe his own ſatisfaction, or his private advantage; but that he ought to direct all his views, all his ſteps, to the great advantage of the ſtate and people who have ſubmitted to him. How noble a ſight is it, to ſee a King of England, acquaint his parliament with his principal operations; aſſure that body, the repreſentations of the nation, that he propoſes no other end but the glory of the ſtate, and the happineſs of his people, and affectionately thank all who concur with him in ſuch ſalutary views! Certainly a monarch who makes uſe of this language, and proves his ſincerity by his conduct, is, in the opinion of the wiſe, the only great man. But for a long time a baſe flattery has, in moſt kingdoms, cauſed theſe maxims to be forgotten. A crowd of ſervile courtiers without difficulty perſuade a proud monarch, that the nation was made for him, and not he for the nation. He ſoon conſiders the kingdom as his patrimony, and his people as a herd of cattle, from which he may obtain riches, and diſpoſe of them ſo as beſt to anſwer his views, and gratify his paſſions. From thence ariſe theſe fatal wars undertaken by ambition, reſtleſsneſs, hatred and pride. From thence thoſe oppreſſive taxes, diſſipated by luxury, or ſquandered upon miſtreſſes and favourites: from thence, in fine, are important poſts given by favour, while public merit is neglected, and every thing that does not immediately intereſt the prince, abandon to miniſters and ſubalterns. Who can obſerve in this unhappy government, authority eſtabliſhed for the public welfare? A great prince will be on his guard, even againſt his virtues. Let us not ſay, with ſome writers, that private virtues are not the virtues of kings: the maxim of ſuperficial politicians, or of

thoſe who are very inaccurate in their expreſſions. Goodneſs, friendſhip, gratitude, are ſtill virtues of the throne; and would to God they were to be always ſo! But a wiſe king does not, without diſcernment, give himſelf up to their impreſſions. He cheriſhes them, he cultivates them in his private life; but in ſtate-affairs he liſtens only to juſtice and ſound politics. And why! becauſe he knows that the government was truſted to him only for the happineſs of ſociety, and that therefore he ought not to conſult his own pleaſure in the uſe he makes of his power. He tempers his goodneſs with wiſdom. He gives to friendſhip his domeſtic and private favours; he diſtributes poſts and employments according to merit; public rewards to ſervices done to the ſtate. In a word, he uſes the public power only with a view to the public welfare. All this is comprehended in the fine ſaying of LEWIS XII. "A King of France does not revenge the injuries of a "Duke of Orleans."

§ 40. Of his repreſentative character.

A political ſociety is a moral perſon (prelim. § 2) as it has an underſtanding and a will, of which it makes uſe for the conduct of its affairs, and is capable of obligations and laws. When therefore a people confer the ſovereignty on any one perſon, they inveſt him with their underſtanding and will; and make over to him their obligations and rights, ſo far as relates to the adminiſtration of the affairs of ſtate, and the exerciſe of the public authority; thus the ſovereign, or conductor of the ſtate becoming the ſubject, in which reſide the obligations and rights relative to government, in him is found the moral perſon, who without abſolutely ceaſing to exiſt in the nation, acts from thence forward only in and by him. Such is the origin of the repreſentative character attributed to the ſovereign. He repreſents the nation in all the affairs it was capable of managing as ſovereign. It does not debaſe the dignity of the greateſt monarch to attribute to him this repreſentative character; on the contrary,

nothing can make him ſhine with greater luſtre: for by this means the monarch unites, in his own perſon, all the majeſty that belongs to the entire body of the nation.

§ 41. He is intruſted with the obligations of the nation, and inveſted with its rights.

The ſovereign thus clothed with the public authority, with every thing that conſtitutes the moral perſonality of the nation, is under the obligations of that nation, and inveſted with its rights.

§ 42. His duty with reſpect to the preſervation and perfection of the nation.

All that has been ſaid in chap. II. of the general duties of a nation towards itſelf particularly regards the ſovereign. He is the depoſitary of the empire, and of the power of commanding whatever relates to the public welfare; he ought, therefore, as a tender and wiſe father, and as a faithful adminiſtrator, to watch for the nation, to take care of preſerving it, to render it more perfect, to better its ſtate, and to ſecure it, as much as he is able, from every thing that threatens its ſafety, or its happineſs.

§ 43. His rights in this reſpect.

From thence he receives all the rights of a nation, to preſerve and improve itſelf (ſee §§. 18. 20. and 23. of this book) all theſe rights, I ſay, reſide in the ſovereign, who is therefore indifferently called the conductor of the ſociety, ſuperior, prince, &c.

§ 44. He ought to know the nation.

We have obſerved above, that every nation ought to know itſelf. This obligation is devolved on the ſovereign, ſince he is to watch over the preſervation and perfection of the nation. The duty which the law of nature here impoſes on the conductors of nations is of extreme importance, and of very great extent. They ought to know exactly all the countries ſubject to their authority, their qualities, defects, advantages, and ſituation with regard to the neighbouring ſtates; and they ought to obtain a perfect knowledge of the manners and general inclinations of their people, their virtues, vices, talents, &c.

All

All these branches of knowledge are necessary to enable them to govern properly.

§ 45. The extent of his power, and sovereign authority.

The prince derives his authority from the nation; and it is exactly equal to what they have intrusted him with. If the nation has simply and strictly invested him with the sovereignty without limitation, or division, he is supposed to be invested with all the prerogatives, without which the sovereign command, or authority, could not be exerted in the manner most conducive to the public welfare. These are called *regal prerogatives*, or *the prerogatives of majesty*.

§ 46. The prince ought to respect, and maintain the fundamental laws.

But the sovereign power is limited and regulated by the fundamental laws of the state; those laws shew the prince the extent and bounds of his power, and the manner in which it ought to be exerted. The prince is therefore strictly obliged not only to respect, but also to support them. The constitution and the fundamental laws are the plan on which the nation has resolved to endeavour the obtaining happiness: the execution is intrusted to the prince. If he religiously follows this plan; if he regards the fundamental laws as inviolable and sacred rules, and knows that the moment he deviates from them, his commands become unjust, and are no less than a criminal abuse of the power with which he is intrusted. He is, in virtue of this power, the guardian and defender of the laws; and being obliged to punish whoever shall presume to violate them, he himself ought not to trample them under his feet.

§ 47. He may change the laws not fundamental.

If the prince be invested with the legislative power he may according to his wisdom, and when it is necessary for the advantage of the state, abolish those laws that are not fundamental, and make new ones. See what we have said on this subject in the preceding chapter, § 34.

But

§ 48. He ought to maintain and obſerve thoſe that ſubſiſt.

But while theſe laws ſubſiſt, the ſovereign ought religiouſly to maintain and obſerve them. They are the foundation of the public tranquillity, and the firmeſt ſupport of the ſovereign authority. Every thing is uncertain, oppreſſive, and ſubject to revolutions, in thoſe unhappy kingdoms where arbitrary power has placed her throne. It is therefore the true intereſt of the prince, as well as his duty, to maintain and reſpect the laws. He ought to ſubmit to them himſelf. We find this truth eſtabliſhed in a piece publiſhed by order of Louis XIV. the moſt abſolute prince that ever reigned in Europe. "Let it not be ſaid that the ſo-"vereign is not ſubject to the laws of his ſtate, ſince "the contrary propoſition is one of the truths of the "law of nations, which flattery has ſometimes attacked, "and which good princes have always defended, as a "tutelar divinity of their ſtates[b]."

§ 49. In what ſenſe he is ſubject to the laws.

But it is neceſſary to explain this ſubmiſſion of the prince to the laws. Firſt he ought, as we have juſt ſeen, to follow their regulations in all the acts of his adminiſtration. In the ſecond place, he is himſelf ſubject, in his private affairs, to all the laws that relate to property. I ſay in his private affairs; for when he acts as a ſovereign prince, and in the name of the ſtate, he is ſubject to none but to the fundamental laws, and the law of nations. In the third place the prince is ſubject to certain regulations of the general polity, conſidered by the ſtate as inviolable, at leaſt if he be not excepted by the law in expreſs terms, or tacitly by a neceſſary conſequence of his dignity. I would ſpeak here of the laws that relate to the ſituation of people in life, and particularly to the validity of marriages. Theſe laws are eſtabliſhed to aſcertain the

[b] A treatiſe on the right of the Queen to ſeveral eſtates in Spain, 1667, in 12mo, part II, pag. 192.

ſtate

ſtate of families: now the royal family is that of all others the moſt important to be certainly known. But fourthly, we ſhall obſerve in general, with reſpect to this queſtion, that if the prince is inveſted with a full, abſolute, and unlimited ſovereignty, he is above the laws, which receive from him all their force, and he may diſpenſe with his own obſervance of them, whenever natural juſtice and equity will permit him. Fifthly, as to the laws relative to manners and good order, the prince ought doubtleſs to reſpect them, and to ſupport them by his example. But ſixthly, he is certainly above all civil penal laws. The majeſty of a ſovereign will not ſuffer his being puniſhed like a private perſon; and his employments are too ſublime to admit of his being troubled under the pretence of a fault that does not directly concern the government of the ſtate.

§ 50. His perſon is ſacred and inviolable.

It is not enough that the prince be above the penal laws: even the intereſt of nations requires that we ſhould go ſomething farther. The ſovereign is the ſoul of the ſociety; if he be not held in veneration by the people, and in perfect ſecurity, the public peace, and the happineſs and ſafety of the ſtate are in continual danger. The ſafety of the nation then neceſſarily requires, that the perſon of the prince ought to be ſacred and inviolable. The people of Rome beſtowed this privilege on their tribunes, in order that they might meet with no obſtruction in defending them, and that the diſcharge of their office might not be attended with fear. The cares, the employments af a ſovereign are of much greater importance, than thoſe of the tribunes were, and not leſs dangerous, if they are unprovided with a powerful defence. It is impoſſible even for the moſt juſt and wiſe monarch, not to make malecontents; and ought the ſtate to continue expoſed to the danger of loſing this prince by the hand of an aſſaſſin? The monſtrous

ſtrous and fooliſh doctrine that a private perſon is permitted to kill a bad prince, deprived the French, in the beginning of the laſt century, of an hero who was truly the father of his country. Whatever a prince may be, it is an enormous crime againſt a nation to deprive the people of a ſovereign, whom they think proper to obey.

§ 51. How a nation may curb a tyrant, and withdraw itſelf from his obedience.

But this high attribute of ſovereignty is no reaſon why a nation ſhould not curb an inſupportable tyrant, call him even to an account, reſpecting in his perſon the majeſty of his rank, and withdraw itſelf from his obedience. To this indiſputable right a powerful republic owes its birth. The tyranny exerciſed by Philip II. in the Netherlands, excited thoſe provinces to riſe: ſeven of them, cloſely confederated, bravely maintained their liberties, under the conduct of a hero of the houſe of Orange and Spain, after ſeveral vain and deſtructive efforts, acknowledged them ſovereign and independent ſtates. If the authority of the prince is limited and regulated by the fundamental laws, the prince on leaving the bounds preſcribed him commands without any right, and even without a juſt title; the nation, then, is not obliged to obey him; but may reſiſt his unjuſt enterpriſes. As ſoon as he attacks the conſtitution of the ſtate, the prince breaks the contract which bound the people to him; the people become free by the act of the ſovereign, and ſee nothing in him but an uſurper who would load them with oppreſſion. This truth is acknowledged by every ſenſible writer, whoſe pen is not enſlaved by fear, or rendered venial by intereſt. But ſome celebrated authors maintain, that if the prince is inveſted with the ſupreme command in a full and abſolute manner, nobody has a right to reſiſt him, much leſs to curb him, and that the nation has no reſource left but to ſuffer and obey with patience. This is founded upon the ſuppoſition that

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ſuch a ſovereign need not give an account to any perſon of the manner in which he governs, and that if the nation might controul his actions and reſiſt him, where they were found to be unjuſt, his authority would no longer be abſolute; which would be contrary to this hypotheſis. They ſay that an abſolute ſovereign poſſeſſes completely all the political authority of the ſociety, in which nobody can oppoſe him; if he abuſes it, he does ill, indeed, and wounds his conſcience, but that his commands are not the leſs obligatory, as being founded on a lawful right to command: that the nation by giving him abſolute authority, had reſerved nothing to itſelf, and had ſubmitted to his diſcretion, &c. We might ſatisfy ourſelves with anſwering, that in this light there is not any ſovereign who is completely and fully abſolute. But in order to remove all theſe vain ſubtilties, let us remember the eſſential end of civil ſociety: is it not to labour in concert for the common happineſs of all? Is it not with this view that every citizen ſtrips himſelf of his rights, and reſigns his liberty? Was it in the power of the ſociety to make ſuch uſe of its authority as to deliver up itſelf, and all its members, without relief, to the diſcretion of a cruel tyrant? No, certainly, ſince it had no right itſelf, if it was diſpoſed to it, to oppreſs a part of the citizens. When it therefore conferred the ſupreme and abſolute government, without an expreſs reſerve, it was neceſſarily with the tacit reſerve, that the ſovereign ſhould uſe it for the ſafety of the people, and not for their ruin. If he becomes the ſcourge of the ſtate, he degrades himſelf? he is no more than a public enemy, againſt whom the nation may and ought to defend itſelf; and if he has carried his tyranny to the utmoſt height, why ſhould even the life of ſo cruel and perfidious an enemy be ſpared? Who preſumes to blame

the

the Roman ſenate, that declared Nero an enemy to his country.

But it is of the utmoſt importance to obſerve, that this judgment can only be paſſed by the nation, or by the body by which it is repreſented, and that the nation itſelf cannot make any attempt on the perſon of the ſovereign, but in caſes of extreme neceſſity, and when the prince, by violating the laws, and threatening the ſafety of his people, puts them in a ſtate of war againſt him. The perſon of the ſovereign, the very intereſt of the nation declares ſacred and inviolable; but not that of an unnatural tyrant, and an enemy of the public. We ſeldom ſee ſuch monſters as Nero. In the moſt common caſes, when a prince violates the fundamental laws; when he attacks the liberties and privileges of his ſubjects; when he is abſolute; when his government, without being carried to the utmoſt length of tyranny, manifeſtly tends to the ruin of the nation; it may reſiſt him, try him, and withdraw from his obedience: but though this may be done, his perſon ſhould be ſpared, and that for the welfare of the ſtate. It is more than one age ſince the Engliſh took up arms againſt their king, and obliged him to deſcend from the throne. The bold and ambitious took advantage of the terrible ferment, cauſed by fanaticiſm and a party ſpirit, and Great Britain ſuffered her ſovereign to die unworthily on a ſcaffold. The nation coming to itſelf, acknowledged its blindneſs: but if it ſome years after made a ſolemn reparation, it was not only from the opinion that the unfortunate Charles I. did not deſerve ſo cruel a fate; but doubtleſs from a conviction, that for the ſafety even of the ſtate, the perſon of the ſovereign ought to be ſacred and inviolable, and that the whole nation ought to render this maxim venerable, in paying a reſpect to it, when the care of its own preſervation would permit.

One

One word more on the diſtinction that is endeavoured to be made here in favour of an abſolute ſovereign. Whoever has well weighed the ſtrength of the indiſputable principles we have eſtabliſhed, will be convinced, that when it is neceſſary to reſiſt a prince become a tyrant, the *right* of the people is the ſame, whether that prince was made abſolute by the laws, or was not; becauſe this *right* flows from the end of political ſociety, the ſafety of the nation, which is the ſupreme law. But if the diſtinction, of which we are treating, is of no moment with reſpect to that right, it can be none in practice, with reſpect to what is ſuitable. As it is very difficult to oppoſe an abſolute prince, and it cannot be done without raiſing great diſturbances in the ſtates, and the moſt violent and dangerous commotions; it ought to be attempted only in caſes of extremity, when the public miſery is raiſed to ſuch a height, that the people may ſay with Tacitus, *miſeram pacem, vel bello bene mutari*; that it is better to expoſe themſelves to a civil war, than to endure them. But if the prince's authority be limited, if it, in ſome reſpects, depends on a ſenate or on a parliament that repreſents the nation, there are means of reſiſtance, and of curbing him, without expoſing the ſtate to ſuch violent ſhocks. There can be no reaſon to expect that the evil will be extreme, when ſuch mild and innocent remedies can be applied to it.

§ 52. Arbitration between the king and his ſubjects.

But however limited the prince's authority may be, he is commonly very jealous of it; it ſeldom happens that he ſuffers reſiſtance with patience, and ſubmits peaceably to the judgment of his people. Can he want ſupport, while he is the diſtributer of favours? We ſee too many baſe and ambitious minds to whom the ſtate of a rich ſlave has more charms, than that of a modeſt and virtuous citizen. It is therefore always difficult for a nation to reſiſt a prince, and pronounce a judgment

ment on his conduct, without expoſing the ſtate to dangerous troubles, and to ſhocks capable of overturning it. This has ſometimes occaſioned a compromiſe between the prince and the ſubjects to ſubmit to the deciſion of a friendly power, all the diſputes that may ariſe between them. Thus the Kings of Denmark have formerly condeſcended, by ſolemn treaties, to refer to thoſe of Sweden, the differences that might ariſe between them and their ſenate; this the Kings of Sweden have alſo done with regard to thoſe of Denmark. The princes and ſtates of Weſt Friezland, and the Burgeſſes of Embden, have in the ſame manner conſtituted the republic of the United Provinces the judge of their differences. The princes of Neufchatel eſtabliſhed, in 1406, the canton of Bern the judge and perpetual arbitrator of their diſputes. Thus alſo, according to the ſpirit of the Helactic confederacy, the entire body takes cognizance of the troubles that ariſe in any of the confederate ſtates, though each of them is truly ſovereign and independent.

§ 53. The obedience which ſubjects owe to a ſovereign.

As ſoon as a nation acknowledges a prince for its lawful ſovereign, all the citizens owe him a faithful obedience. He can neither govern the ſtate, nor perform what the nation expects from him, if he is not punctually obeyed. Subjects then have no right, in doubtful caſes, to queſtion the wiſdom or juſtice of their ſovereign's commands; this examination belongs to the prince: his ſubjects ought to ſuppoſe, if there be a poſſibility of doing it, that all his orders are juſt and ſalutary: he alone is accountable for the evil that may reſult from them.

§ 54. In what caſes they may reſiſt him.

In the mean time, this ought not to be entirely a blind obedience. No engagement can oblige, or even authorize, a man to violate the laws of nature. All authors who have any regard to conſcience, or modeſty, agree, that a perſon ought not to obey ſuch commands

mands as are evidently contrary to the laws of God. Thoſe governors of places who bravely refuſed to execute the barbarous orders of Charles IX. to the famous St. Bartholomew, have been univerſally praiſed; and the court did not dare to puniſh them, at leaſt openly. "Sire," ſaid the brave Orte, governor of Bayonne, in his letter, "I have communicated your majeſty's com-"mand to your faithful inhabitants and warriors in the "garriſon: and I have found there only good citizens "and brave ſoldiers; not one hangman: therefore "both they and I moſt humbly entreat your Majeſty, "to be pleaſed to employ our arms and lives in things "that are poſſible, however hazardous they may be, "and we will exert ourſelves to the laſt drop of our "blood."[a]. The Count de Tende, Charney, and others, replied to thoſe who brought them the orders of the court, that they had too great a reſpect for the king, to believe that ſuch barbarous orders came from him.

It is more difficult to determine in what caſes a ſubject may not only refuſe to obey, but even reſiſt a ſovereign, and by force repel force. When a ſovereign does injury to any one, he acts without any regal authority; but we ought not from thence to conclude haſtily, that the ſubject may reſiſt him. The nature of ſovereignty, and the welfare of the ſtate will not permit citizens to oppoſe a prince whenever his commands appear to them unjuſt or prejudicial. This would be to fall again into the ſtate of nature, and to render government impoſſible. A ſubject ought to ſuffer with patience from the prince, acts of injuſtice that are doubtful and ſupportable. Firſt, becauſe whoever has ſubmitted to the deciſion of a judge, is no longer capable of deciding his own pretenſions: thoſe inſtances of

[a] Mezeray's Hiſt. of France, Vol. II. p. 1107.

injuſtice

injuſtice that are ſupportable ought to be paſſed over from a regard to the peace and ſafety of the ſtate, and on account of the great advantages obtained by living in ſociety. It is preſumed that every citizen has tacitly engaged to obſerve this moderation, becauſe, without it ſociety could not ſubſiſt. But when the injuries are manifeſt and atrocious, when a prince, without any apparent reaſon, is reſolved to deprive us of life, or of thoſe things, the loſs of which would render life bitter, who can diſpute our right to reſiſt him? Self-preſervation is not only a Law of Nature, but an obligation impoſed by Nature, and no man can entirely and abſolutely give up to another. And though he might give it up, can he be conſidered as having done it by his political engagements, when he entered into ſociety only to eſtabliſh his own ſafety upon a more ſolid baſis? The welfare of ſociety does not require ſuch a ſacrifice; and as Barbeyrac well obſerves in his notes on Grotius, "If the public intereſt requires, that thoſe who obey, ſhould particularly ſuffer ſomething; it is not leſs for the public intereſt that thoſe who command, ſhould be afraid of carrying their patience to the utmoſt extremity[b]." The prince who violates all laws, who obſerves no meaſures, and who would in his tranſports of fury take away the life of an innocent perſon, ſtrips himſelf of his royalty, and is no more than an unjuſt and outrageous mortal, againſt whom his people are allowed to defend themſelves. But he who, after having loſt all the ſentiments of a ſovereign, diveſts himſelf even of the appearances and exterior conduct of a monarch, degrades himſelf; he no longer retains the ſacred perſon of a ſovereign, and cannot retain the prerogatives attached to his ſublime character. However, if this prince is

[b] *De jure belli & Pacis, Lib.* I. *Cap.* iv. § ii. *not.* 1.

not a monſter, if he is furious, only from a juſt paſſion, and is ſupportable to the reſt of the nation; the reſpect we ought to pay to the tranquillity of the ſtate is ſuch, and the reſpect of ſovereign majeſty ſo powerful, that we are ſtrictly obliged to ſeek every other means of preſervation, rather than to put his perſon in danger. Every one knows the example ſet by David: he fled; he kept himſelf concealed, to ſecure himſelf from Saul's fury; and more than once ſaved the life of his perſecutor. When the reaſon of Charles VI. of France, was ſuddenly diſordered by a fatal accident, he in his fury killed ſeveral of thoſe who ſurrounded him; none of them thought of ſecuring his own life, at the expence of that of the king; they only endeavoured to diſarm him, and to make him maſter of himſelf: they did their duty like brave men and faithful ſubjects, in expoſing their lives, to ſave that of this unfortunate monarch. We owe this ſacrifice to the ſtate and to ſovereign majeſty: furious from the diſorder of his organs, Charles was not guilty, he might recover his health, and again become a good king.

§ 55. Of miniſters.

What has been ſaid is ſufficient for the intention of this work: the reader may ſee theſe queſtions treated more at large in many books that are well known. We ſhall finiſh this ſubject with an important obſervation. A ſovereign is undoubtedly allowed to take miniſters, to eaſe him in the painful office of government; but he ought never to abandon his authority to them. When a nation chuſes a conductor, it is not for him to deliver up his charge into other hands. Miniſters ought to be only inſtruments in the hands of the prince; he ought conſtantly to direct them, and continually endeavour to know whether they follow his inſtructions. If the imbecility of age, or ſome infirmity render him incapable of government, a regent ought to be nominated according to the laws of the ſtate, but when the ſovereign can hold the reins, let him

him make uſe of them, and not put them into other hands. The laſt kings of France of the firſt race delivered the government and authority to the mayors of the palace: thus they became mere phantoms, and juſtly loſt the title and honour of a dignity, the functions of which they had abandoned. The nation is a gainer by crowning an all-powerful miniſter; for he will improve as his inheritance, the funds he plundered while he had only a precarious uſe of them.

CHAP. V.

Of States Elective, Succeſſive or Hereditary, and of thoſe called Patrimonial.

§ 56. Of elective ſtates.

WE have ſeen in the preceding chapter, that it originally belonged to a nation to confer the ſupreme authority, and to chuſe that by which it was to be governed. If it confers the ſovereignty on the perſon only, reſerving the right of chuſing a ſucceſſor after the ſovereign's death, the ſtate is *elective*. As ſoon as the prince is elected according to law, he enters into the poſſeſſion of all the prerogatives which thoſe very laws annex to his dignity.

§ 57. If elective kings are real ſovereigns.

It has been debated whether elective kings and princes are real ſovereigns. But he who lays any ſtreſs on this circumſtance muſt have only a very confuſed idea of ſovereignty. The manner in which a prince obtains his dignity, has nothing to do with determining its nature. We muſt conſider, firſt, whether the nation itſelf forms an independent

independent ſociety (ſee chap. I.) and ſecondly, what is the extent of the power it has intruſted to the prince. Whenever the chief of an independent ſtate really repreſents a nation, he ought to be conſidered as a true ſovereign (§ 40.) though even his authority ſhould be limited in ſeveral reſpects.

§ 58. Of ſtates ſucceſſive and hereditary. The origin of the right of ſucceſſion.

When a nation would avoid the troubles with which the election of a ſovereign ſeldom fails of being accompanied, it makes its choice for a long ſucceſſion of years, by eſtabliſhing the *right of ſucceſſion*, or in rendering the crown hereditary in a family, according to the order and rules that appear moſt agreeable to that nation. The name of an *Hereditary State* or *Kingdom* is given to that where the ſucceſſor is appointed by the ſame law that regulates the ſucceſſions of the individuals. The *Succeſſive Kingdom* is that where a perſon ſucceeds according to a particular fundamental law of the ſtate. Thus the lineal ſucceſſion of the males alone, is eſtabliſhed in France.

§ 59. Other origins of this right.

The right of ſucceſſion is not always the primitive eſtabliſhment of a nation; it may have been introduced by the ſucceſſion of another ſovereign; and even by uſurpation itſelf. But when it is ſupported by a long poſſeſſion, the people are conſidered as having conſented to it; and this tacit conſent renders it lawful, though the ſource be vicious. It reſts then on the foundation we have already pointed out, a foundation that alone is lawful and incapable of being ſhaken, and to which it muſt conſtantly return.

§ 60. Other ſources which ſtill return to the ſame.

This right, according to moſt authors, and particularly Grotius, may be derived from other ſources, as conqueſt, or the right of a proprietor, who on his becoming maſter, of a country, invites inhabitants to ſettle there, and gives them lands, on condition of their acknowledging him and his heirs for their ſovereigns. But as it is abſurd to ſuppoſe that a ſociety of men can ſubmit otherwiſe than with a view to their own ſafety and welfare, and ſtill more

that they can bind their poſterity on any other footing, every thing muſt at laſt return to the ſame ſource, and it muſt ſtill be ſaid, that the ſucceſſion is eſtabliſhed by the expreſs will, or by the tacit conſent of the nation, for the welfare and ſafety of the ſtate.

§ 61. A nation may change the order of the ſucceſſion.

It thus remains a conſtant truth, that in all caſes the ſucceſſion is only eſtabliſhed and received with a view to the public welfare and the common advantage. If it happens then that the order eſtabliſhed in this reſpect becomes deſtructive to the ſtate, the nation has certainly the right of changing it by a new law. *Salus populi ſuprema lex*, the ſafety of the people is the ſupreme law; and this law is agreeable to the ſtricteſt juſtice, the people being united in ſociety only with a view to their ſafety and greater advantage.

This pretended proprietary right attributed to princes, is a chimera produced by an abuſe of the pretended laws of inheritance with reſpect to private perſons. The ſtate neither is, nor can be a patrimony, ſince the patrimony is only made for the welfare of the maſter, while the prince is eſtabliſhed only for the welfare of the ſtate. The conſequence is evident: if the nation plainly perceives the heir would be a pernicious ſovereign, it has a right to exclude him.

The authors whom we oppoſe, grant this right to a deſpotic prince, while they refuſe it to nations. This is becauſe they conſider ſuch a prince as a real proprietor of the empire, and will not acknowledge that the care of their own ſafety, and the rights of government eſſentially belong to the ſociety, when they have entruſted them without expreſs reſerve to a monarch and his heirs. In their opinion, the kingdom is the inheritance of the prince, in the ſame manner as his field and his flocks. A maxim injurious to human nature, and which they would not have produced in an enlightened age, if they had not ſupports that are too often ſtronger than reaſon and juſtice.

A nation

§ 62. Of renunciations.

A nation may, for the ſame reaſon, oblige one branch who removes to another country to renounce all claim to the crown, as a daughter who marries a foreign prince. Theſe renunciations required or approved by the ſtate, are extremely valid, ſince they are equivalent to a law that ſuch perſons and their poſterity ſhould be excluded from the throne. Thus the laws of England have for ever rejected every Roman Catholic. "Thus "a law of Ruſſia made at the beginning of the reign of "Elizabeth, moſt wiſely excluded from the poſſeſſion of "the crown, every heir who poſſeſſed another mo-"narchy; and thus the law of Portugal diſqualifies eve-"ry ſtranger who lays claim to the crown by right of "blood [a]."

Celebrated authors, in other reſpects very learned and judicious, have then wanted true principles in treating of renunciations. They have expatiated greatly on the rights of infants born or to be born, of the tranſmiſſion of theſe rights, &c. but they ought to have conſidered the ſucceſſion as leſs a property of the reigning family, than as a law of the ſtate. From this clear and inconteſtible principle eaſily flows the whole doctrine of renunciations. Thoſe required or approved by the ſtate are valid and ſacred; and theſe are the fundamental laws: Thoſe not authoriſed by the ſtate can be only obligatory to the prince who made them. They cannot injure his poſterity, and he himſelf may return, in caſe the ſtate requires and calls him; for this he owes to a people who had committed their ſafety to his care. By the ſame reaſon, the prince cannot lawfully reſign at an improper juncture to the damage of the ſtate, and abandon in imminent danger a nation that had put itſelf under his care.

[a] *Spirit of Laws*, Book XXVI. Chap. XXIII. where may be ſeen very good political reaſons for theſe regulations.

§ 63. The order of ſucceſſion ought commonly to be kept.

In ordinary caſes, when the ſtate may follow the eſtabliſhed rule, without being expoſed to very great and manifeſt danger, it is certain, that every deſcendant ought to ſucceed, when the order of the ſucceſſion calls him to the throne, with whatever incapacity of reigning by himſelf he may be accuſed. This is a conſequence of the ſpirit of the law that eſtabliſhed the ſucceſſion: for the people had recourſe to it to prevent the troubles which would otherwiſe have been almoſt inevitable at every change. Now little advances muſt have been made towards obtaining this end, if at the death of a prince, the people were allowed to examine the capacity of his heir, before they acknowledged him for their ſovereign. "What a door would this open for uſurpers or male-"contents!—It was to avoid theſe inconveniencies that "the order of ſucceſſion was eſtabliſhed; and nothing "more wiſe could have been done; ſince by this means "no more is required than his being the king's ſon, and "his having life, which can admit of no diſpute; but "on the other hand there is no rule fixed to judge of "the capacity or incapacity of reigning[b]." Though the ſucceſſion was not eſtabliſhed for the particular advantage of the ſovereign and his family, but for that of the ſtate; the ſucceſſor appointed has nevertheleſs a right, to which juſtice requires that regard ſhould be paid. His right is ſubordinate to that of the nation, or to the ſafety of the ſtate; but it ought to take place, when the public welfare does not oppoſe it.

§ 64. Of regents.

Theſe reaſons have the greater weight, where the law, or the ſtate, may remedy the incapacity of the prince by nominating a regent, in the ſame manner as is practiſed in caſe of his minority. This regent is inveſted, during the whole time of his adminiſtra-

b Memorial in behalf of Madam de Longueville, touching the principality of Neufchatel, in 1672.

tion,

tion, with the royal authority; but he executes it in the king's name.

§ 65. The invisibility of sovereignties.

The principles we have just established on the successive or hereditary right, manifestly shew, that a prince has no right to divide his state among his children. Every sovereignty properly so called, is in its own nature, one and indivisible; and those who have united in society cannot be separated in spite of themselves. These partitions, so contrary to the nature of sovereignty and the preservation of states, have been much in use: but an end has been put to them, wherever the people, and even the princes themselves, have had a full view of their greatest interest, and the foundation of their safety.

But when a prince has united several different nations under his authority; his empire is then properly an assemblage of several societies subject to the same head; and nothing can naturally hinder his being able to divide them between his children: he may distribute them, if there be no law, nor any conventions to the contrary, and if each of his states consents to receive the sovereign he appoints for it. For this reason France was divided under the two first races [c]. But being entirely incorporated under the third, it became indivisible, and a fundamental law has declared it so. That law, wisely providing for the preservation and splendour of the kingdom, unites irrevocably to the crown all the acquisitions of its kings.

§ 66. Who are to decide the disputes relating to the succession to a sovereignty.

The same principles also furnish us with the solution of a celebrated question. When the right of succession becomes uncertain in a successive or hereditary state, and two or three competitors lay claim to the crown; it is asked, who shall be the judge of their pretensions?

[c] It must be observed, that these partitions ought not to be made without the approbation and consent of the respective states.

Some

Some learned men, reſting on the opinion that ſovereigns acknowledge no other judge but God, have maintained, that the competitors for the crown, while their right is uncertain, ought either to come to an amicable agreement, and enter into articles among themſelves, or to chooſe arbitrators, to have recourſe to lots, or, in ſhort, to determine the diſpute by arms; and that the ſubjects cannot in any manner decide the queſtion. It is aſtoniſhing that celebrated authors ſhould have maintained ſuch a doctrine. But even in ſpeculative philoſophy, there is nothing ſo abſurd as not to have been advanced by ſome philoſophers [d]; indeed little can be expected from the human mind when ſeduced by intereſt or fear. What! in a queſtion that concerns none ſo much as the nation, that relates to the power eſtabliſhed only with a view to the happineſs of the people; in a quarrel that is going to decide for ever their moſt valuable intereſts, and their very ſafety, are they to ſtand by as tranquil ſpectators! Are they to allow ſtrangers by the blind lot of arms, to appoint them a maſter, as a flock of ſheep is to wait till it is determined, whether they are to be delivered up to the butcher, or reſtored to the ſhepherd's care!

But, ſay they, the nation has ſtripped itſelf of all juriſdiction, by giving it to a ſovereign; it has ſubmitted to the reigning family, it has given to thoſe who are deſcended from that family a right which nobody can take from them: it has eſtabliſhed them its ſuperiors; and can no longer judge them. Very well! But ought not this nation to know to whom it is bound, and to prevent its being delivered up to another? And ſince it has eſtabliſhed the law of ſucceſſion, who can better,

d Neſcio quomodo nihil tam abſurdè dici poteſt, quod non dicatur ab aliquo philoſophorum. *Cicero de Divinat. Lib. II.*

who

who has a greater right to appoint him whom the fundamental law has provided and pointed out? Let us say then without hesitation, that the decision of this grand controversy belongs to the nation, and to the nation alone. If even the competitors have agreed among themselves, or have chosen arbitrators, the nation is not obliged to submit to what they have thus regulated, unless it has consented to the transaction or compromise; princes not acknowledged, and whose right is uncertain, not being in any manner able to dispose of its obedience. It can acknowledge no judge over it in an affair that relates to its most sacred duties, and most precious rights.

Grotius and Pussendorff differ in reality but little from this opinion; but would not have it called the decision of the people, or state, or a juridical sentence *(judicium jurisdictionis)*. And we shall not dispute about words. However, more here is required than a mere examination of their rights, in order to submit to that competitor who has the best. All the disputes that arise in society ought to be judged and decided by the public authority. As soon as the right of succession is found uncertain, the sovereign authority returns for a time to the body of the state, which ought to exercise it, either by itself, or by its representatives, till the true sovereign be known. "The contest on this right sus-
"pending the functions in the person of a sovereign,
"the authority naturally returns to the subjects, not to
"be retained by them, but to allow them to prove on
"which of the competitors it lawfully devolves, in
"whose hands they are at length to place it. It would
"not be difficult to support, by an infinite number of
"examples, a truth so evident by the light of reason:
"it is sufficient to remember, that the states of France,
"after the death of Charles the Fair, terminated the
"famous

" famous diſpute between Philip de Valois and the " king of England (Edward III.) and that theſe ſtates, " though ſubject to him in whoſe favour they granted " the deciſion, were nevertheleſs the judges of the diſ- " pute [e]."

Guichardin, Book XII. alſo ſhews that the ſtates of Arragon decided the ſucceſſion to that kingdom, in favour of Ferdinand, the grandfather of Ferdinand, the huſband of Iſabella queen of Caſtile, in preference to the other relations of Martin king of Arragon, who pretended that the kingdom belonged to them [f].

It was alſo the ſtates who in the kingdom of Jeruſalem decided the diſputes of thoſe who made pretenſions to it, as is juſtified by ſeveral examples in the foreign political hiſtory [g].

The ſtates of the principality of Neufchatel have often pronounced in form a juridical ſentence on the ſucceſſion of the ſovereignty. In the year 1707, they decided between a great number of competitors, when their deciſion in favour of the king of Pruſſia was acknowledged by all Europe in the treaty of Utrecht.

§ 67. That the right of the ſucceſſion ought not to depend on the judgment of a foreign power.

The better to ſecure the ſucceſſion in a certain and invariable order, it is at preſent eſtabliſhed in all Chriſtian ſtates (Portugal excepted) that no deſcendant of the ſovereign can ſucceed to the crown, if he is not born in marriage conformably to the laws of the country. As the nation has eſtabliſhed the ſucceſſion, to the

[e] The anſwer in behalf of Madame de Langueville, to a memorial in behalf of Madame de Nemours.

[f] Ibid.

[g] See the ſame memorial which quotes P. Labbe's Royal Abridgement, page 501, and following.

nation

nation alone belongs the power of acknowledging thoſe who are capable of ſucceeding; and conſequently on its judgment and laws alone muſt depend the validity of the marriage of its ſovereigns, and the legitimacy of their birth.

If education had not the power of familiariſing the human mind to the greateſt abſurdities, is there a wiſe man who would not be ſtruck with aſtoniſhment at ſeeing ſo many nations ſuffer the legitimacy and right of their princes to depend upon a foreign power? The court of Rome has invented an infinite number of obſtructions and nullities in marriages, and at the ſame time arrogates to itſelf the right of judging of their validity, and of raiſing obſtructions; ſo that a prince of its communion cannot in certain caſes be ſo much his own maſter, as to contract a marriage neceſſary to the ſafety of the ſtate. Jane, the only daughter of Henry IV. king of Caſtile, found this true by experience. Some rebels publiſhed abroad that ſhe owed her birth to Bertrand da la Cueva, the king's favourite, and in ſpite of the declarations and laſt will of that prince, who conſtantly acknowledged Jane for his daughter, and nominated her his heireſs, they called to the crown Iſabella Henry's ſiſter, and the wife of Ferdinand heir of Arragon The grandees of Jane's party, had provided a powerful reſource by negotiating a marriage with Alphonſus king of Portugal: but as that prince was Jane's uncle, it was neceſſary to obtain a diſpenſation from the pope, and Pius II. who was in the intereſt of Ferdinand and Iſabella, refuſed to grant the diſpenſation, though ſuch alliances were then very common. Theſe difficulties cooled the ardour of the Portugueſe monarch, and abated the zeal of the faithful Caſtilians. Every thing ſucceeded with Iſabella, and the unfortunate

unfortunate Jane took the veil, in order to ſecure, by this heroic ſacrifice, the peace of Caſtile [h].

If the prince proceeds and marries, notwithſtanding the pope's refuſal, he expoſes his dominions to the moſt fatal troubles. What would have become of England, if the reformation had not been happily eſtabliſhed when the pope preſumed to declare queen Elizabeth illegitimate, and incapable of wearing the crown?

Lewis of Bavaria, a great emperor, here boldly claimed the rights of his crown. We ſee in the diplomatic code of the law of nations by Leibnitz [i] two acts in which that prince condemns, as an invaſion of the imperial authority, the doctrine that attributes to any other power but his own, the right of granting diſpenſations, and of judging of the validity of marriages, in the places under his obedience; but he was neither well-ſupported in his life-time, nor imitated by his ſucceſſors.

[h] I take this hiſtorical paſſage from *M Du port de Tertre's Conſpiracies*, for I have not the original hiſtorians by me. However, I do not enter into the queſtion relating to the birth of Jane: this would here be of no uſe. The princeſs had not been declared a baſtard according to the laws; the king acknowledged her for his daughter; and beſides, whether ſhe was or was not legitimate, the inconveniences that followed from the pope's refuſal, remained the ſame, both with reſpect to her and the king of Portugal.

[i] P. 254. *Forma divortii matrimonialis inter Johannem filium Regis Bohemiæ & Margarethan Duciſſam Karinthiæ.* This divorce is given by the emperor on account of the impotency of the huſband, *per auctoritatem*, ſays he, *nobis ritè debitam & conceſſam.* P. 156. *Forma diſpenſationis ſuper affinitate conſanguinitatis inter Ludovicum Marchionem Brandenburg, & Margaretham Duciſſam Karinthiæ, nec non legitimatio liberorum procreandorum, factæ per Dom. Ludovic. IV. Rom. Imper.*

It is only an human law, ſays the emperor, that hinders theſe marriages, *infra gradus affinitatis ſanguinis præſertim infra fratres & ſorores. De cujus legis præceptis diſpenſare ſolummodò pertinet ad auctoritatem Imperatoris ſeu principiis Romanorum.* He at length oppoſes and condemns the opinion of thoſe who dared to ſay that theſe diſpenſations depended on eccleſiaſtics. Both this act and the former are dated in the year 1341.

There

§ 68. Of ſtates called patrimonial.

There are, in fine, ſtates in which the ſovereign may chooſe his ſucceſſor, and even transfer the crown to another during his life: theſe are commonly called *patrimonial* kingdoms or ſtates: but let us reject ſo unjuſt and ſo improper an epithet, which can only ſerve to raiſe in the minds of ſovereigns, ideas very oppoſite to thoſe they ought to entertain. We have ſhewn (§ 61.) that a ſtate cannot be a patrimony. But it may happen, that a nation, either as an effect of an entire confidence in the prince, or from ſome other reaſon, has entruſted him with the care of appointing a ſucceſſor, and even conſented to receive, if he thinks proper, another ſovereign from his hands. Thus we ſee Peter I. emperor of Ruſſia, nominated his wife to ſucceed him, though he had children.

§ 69. All true ſovereignty is unalienable.

But when a prince chooſes his ſucceſſor, or when he cedes the crown to another, he properly only nominates, in virtue of the power with which he is entruſted, either expreſsly, or by a tacit conſent, him who is to govern the ſtate after him. This neither is nor can be an alienation properly ſo called. Every true ſovereignty is unalienable in its own nature. We ſhall be eaſily convinced of this, if we pay attention to the origin and end of political ſociety, and of the ſupreme authority. A nation becomes incorporated into a ſociety, to labour for the common welfare, as it ſhall think proper, by living according to wholeſome laws. With this view it eſtabliſhes a public authority. If it truſts this authority to a prince, even with the power of tranſmitting it into other hands; this can never be, at leaſt by the expreſs and unanimous conſent of the citizens, with the right of really alienating or ſubjecting the ſtate to another body politic: for the individuals who have formed this ſociety are entered into it in order to live in an independent ſtate, and not under a foreign yoke. Let them not oppoſe againſt

againſt us any other ſource of this right, as conqueſt, for inſtance, for we have already ſhewn (§ 60.) that theſe different ſources return at length to the true principles on which all juſt governments are founded. While the victor does not treat his conqueſts according to theſe principles, the ſtate of war ſtill in ſome meaſure ſubſiſts. At the moment when he places it in a civil ſtate, his rights are proportioned by the principles of the ſtate.

I know that many authors, and particularly Grotius [k], give long enumerations of the alienations of ſovereignties. But examples frequently prove only the abuſes that have been made of power, and not what is right. And beſides, the people conſented to the alienation, either willingly or by force. What could the inhabitants of Pergamos, Bithynia, and Cyrene do, when their kings gave them by their laſt wills to the Roman people? Nothing remained for them, but the part of ſubmitting with a good grace to ſo powerful a legatee. In alledging an example capable of ſerving as an authority, it was neceſſary for them to have cited that of a people reſiſting a like diſpoſition of their ſovereign, and that reſiſtance being generally condemned as unjuſt and rebellious. Had Peter I. who nominated his wife to ſucceed him, been willing to ſubject his empire to the Grand Signior, or to ſome other neighbouring power, can we believe that the Ruſſians would have ſuffered it, and that their reſiſtance would have paſſed for a revolt? We do not find in Europe any great ſtate that is reputed alienable. If ſome petty principalities have been conſidered as ſuch, it is becauſe they were not true ſovereignties. They aroſe in the empire with greater or leſs liberty: their maſters

[k] *De jure Belli & Pacis*, Lib. I. Cap. III. § XII.

made

made a traffic of the rights they poſſeſſed in theſe territories; but they could not withdraw them from a dependence on the empire.

Let us conclude, then, that nations alone have the right of ſubmitting to a foreign power; for the right of really alienating the ſtate, can never belong to the ſovereign, unleſs it be given him by the entire body of the people. That of nominating the ſucceſſor, or committing the ſceptre to other hands, muſt alſo be preſumed, and ought to be founded on an expreſs conſent, on a law of the ſtate, or on long cuſtom, juſtified by the tacit conſent of the people.

§ 70. The duty of a prince who nominates his ſucceſſor.

If the power of nominating a ſucceſſor is truſted to the ſovereign, he ought to have no other view in his choice, but the advantage and ſafety of the ſtate. He himſelf was eſtabliſhed only for this end (§ 39.); the liberty of conferring his power on another, could then be only granted him with the ſame view. It would be abſurd to conſider a prerogative of uſe to the prince, of which he might make his private advantage. Peter the Great propoſed only the welfare of the empire when he left the crown to his wife. He knew that heroine was moſt capable of following his views, and of perfecting the great things he had begun, and therefore preferred her to his ſon, who was ſtill very young. If we often found on the thronce ſuch elevated minds as Peter's, a nation could not take wiſer meaſures in order to be well governed, than to truſt the prince, by a fundamental law, with the power of appointing his ſucceſſor. This meaſure would be much better than the order of birth. The Roman emperors who had no male children, appointed a ſucceſſor by adoption. Rome was obliged to this cuſtom for a ſeries of ſovereigns unequalled in hiſtory: Nerva, Trajan, Adrian himſelf, and Marcus Aurelius; what princes! Does the right of birth often place ſuch on the throne?

We

§ 71. He muſt have at leaſt a tacit ratification.

We may go ſtill farther, and boldly ſay, that in an act of ſuch importance to the ſafety of the entire nation, the tacit conſent and ratification of the people or ſtate, is at leaſt neceſſary, to give it a full and entire effect. If an emperor of Ruſſia had thought proper to nominate for his ſucceſſor a ſubject notoriouſly unworthy of the crown, it is not at all probable that ſuch a vaſt empire would have blindly ſubmitted to ſo pernicious an appointment. And who would preſume to blame a nation for refuſing to be ruined out of reſpect to the laſt orders of its prince? As ſoon as the people ſubmits to the ſovereign appointed to rule over them, they tacitly ratify the choice made by the laſt prince; and the new monarch enters into all the rights of his predeceſſor.

CHAP. VI.

The principal Objects of a good Government; and firſt on providing for the Neceſſities of the Nation.

§ 72. The end of ſociety ſhews the ſovereign his duties. 1. He ought to procure plenty.

AFTER theſe obſervations on the conſtitution of the ſtate itſelf, we come now to the principal objects of a good government. We have ſeen above (§ 41, and 42.) that the prince on his being inveſted with the ſovereign authority, is entruſted with the duties of the nation in relation to government. In treating of the objects of a wiſe adminiſtration, we muſt then ſhew the duties of a nation towards itſelf, and thoſe of the ſovereign towards his people.

A wiſe

A wiſe conductor of the ſtate will find in the end of civil ſociety the general rule and indication of his duties. The ſociety is eſtabliſhed with the view of procuring to thoſe who are its members, the neceſſities, conveniencies, and accommodations of life; and in general, every thing neceſſary to their felicity; to take ſuch meaſures that each may peacefully enjoy his own property, and obtain juſtice with ſafety; and, in ſhort, to defend the whole from all violence from without. (§ 15.) The nation, or its conductor, ſhould firſt apply to the buſineſs of providing for all the wants of the people, and producing a happy plenty of all the neceſſaries of life, with its conveniences and innocent and laudable enjoyments. As an eaſy life without ſloth contributes to the happineſs of men, they are thus placed in a condition to labour with greater ſafety and ſucceſs after their own perfection; which is their grand and principal duty, and one of the views they ought to propoſe by uniting in ſociety.

§ 73. To take care of their being a ſufficient number of workmen.

To ſucceed in procuring this abundance of every thing, it is neceſſary to take care that they have a ſufficient number of able workmen in every uſeful or neceſſary profeſſion. An authentic application to government, wiſe regulations, and aſſiſtance properly granted, will produce this effect, without uſing conſtraint, which is always fatal to induſtry.

§ 74. To hinder the departure of thoſe that are uſeful.

Thoſe workmen that are uſeful, ought to be retained in the ſtate, and in this the public authority has certainly a right of uſing reſtraint, if it be found neceſſary, to ſucceed in it. Every citizen owes this to his country; and an artiſt in particular who is nouriſhed, educated, and inſtructed in its boſom, cannot lawfully leave it, and carry to ſtrangers an induſtry which he learnt at home; unleſs his country has no occaſion for him, or he cannot there obtain the juſt fruit of his labour and abilities. Buſineſs muſt then be procured for him; and if while

while able to obtain an honeſt livelihood in his own country, he would for no reaſon abandon it, the ſtate has a right to prevent him. But a very moderate uſe ought to be made of this right, and only in important or neceſſary caſes. Liberty is the ſoul of abilities and induſtry: frequently a workman or an artiſt, after having travelled abroad, is recalled home by a natural ſenſation, more able and better qualified to ſerve his country than before. If certain caſes be excepted, it is beſt in this affair to practiſe the mild methods of protection, encouragement, &c. and to leave the reſt to that natural love felt by all men for the places of their birth.

§ 75. Of the emiſſaries who entice them away.

As to thoſe emiſſaries who come into a country to entice away uſeful ſubjects, the ſovereign has a right to puniſh them ſeverely, and has juſt cauſe of complaint againſt the power by whom they are employed.

We ſhall treat elſewhere more particularly of the general queſtion, whether a citizen is permitted to leave the ſociety of which he is a member. The particular reaſons relating to uſeful workmen are ſufficient here.

§ 76. They ought to encourage labour and induſtry.

The ſtate ought to encourage labour, to animate induſtry, and to excite abilities; to propoſe honours, rewards, privileges; and to take ſuch meaſures that any one may live by his induſtry. Here England deſerves to be propoſed for an example. The parliament inceſſantly attends to theſe important affairs, in which neither care nor expence is ſpared. And do we not even ſee a ſociety of excellent citizens formed with this view, and devote conſiderable ſums to this uſe. Prizes are alſo diſtributed in Ireland to the mechanics, huſbandmen, and who moſt diſtinguiſh themſelves. Can ſuch a ſtate fail of being powerful and happy.

CHAP. VII.

Of the Cultivation of the Earth.

§ 77. The utility of tillage.

OF all the arts, tillage, or agriculture, is doubtleſs the moſt uſeful and neceſſary. It is the nurſing father of the ſtate. The cultivation of the earth cauſes it to produce an infinite increaſe; it forms the ſureſt reſource, and the moſt ſolid funds of riches and commerce, for the people who enjoy an happy climate.

§ 78. The meaſures neceſſary in this reſpect. On the diſtribution of the lands.

This affair then deſerves the utmoſt attention of the government. The ſovereign ought to neglect no means of rendering the land under his obedience as well cultivated as poſſible. He ought not to allow either communities or private perſons to acquire large tracts of land in order to leave it uncultivated. Theſe rights of *common* which deprive the proprietor of the free liberty of diſpoſing of his lands, that will not allow him to farm them, and to cauſe them to be cultivated in the moſt advantageous manner; theſe rights, I ſay, are contrary to the welfare of the ſtate, and ought to be ſuppreſſed, or reduced to juſt bounds. The property introduced among the citizens, does not prevent the nations having a right to take the moſt effectual meaſures to cauſe the whole country to produce the greateſt, and moſt advantageous revenue poſſible.

§ 79. On the protection of huſbandmen.

The government ought carefully to avoid every thing capable of diſcouraging the huſbandman, or of diverting him from the labours of agriculture. Thoſe taxes, thoſe exceſſive and ill-proportioned impoſitions, the burden of which falls almoſt entirely on the culti-

vators; and the vexations they ſuffer from the commiſſioners who levy them, take from the unhappy peaſant the means of cultivating the earth, and depopulate the country. Spain is the moſt fertile, and the worſt cultivated country in Europe. The church poſſeſſes too much land, and the undertakers of the royal magazines, who are authoriſed to purchaſe at a low price, all the corn they find in the poſſeſſion of a peaſant, above what is neceſſary for the ſubſiſtence of himſelf and his family, ſo greatly diſcourage the huſbandman, that he ſows no more corn than is neceſſary for the ſupport of his own houſhould. Whence frequently ariſes the greateſt ſcarcity in a country capable of feeding its neighbours.

§ 80. The huſbandmen ought to be held in eſteem.

Another abuſe injurious to agriculture is, the contempt caſt upon the huſbandman. The inhabitants of cities, even the moſt ſervile artiſts, and the moſt lazy citizens, conſider him that cultivates the earth with a diſdainful eye; they humble and diſcourage him. They dare to deſpiſe a profeſſion that feeds the human race; the natural employment of man. A little inſignificant ſtay-maker or a taylor, places far beneath him the beloved employment of the firſt conſuls and dictators of Rome. China has wiſely prevented this abuſe; agriculture is there held in honour, and to preſerve this happy manner of thinking, every year, on a ſolemn day, the Emperor himſelf, followed by his whole court, ſets his hand to the plough, and ſows a ſmall piece of land. Hence China is the beſt cultivated country in the world: It nouriſhes an innumerable multitude of people, that at firſt appears to the traveller too great for the ſpace they poſſeſs.

§ 81. The cultivation of the earth a natural obligation.

The cultivation of the ſoil is not only to be recommended by the government on account of the extraordinary advantages that flow from it; but from its being an

an obligation impoſed by nature on mankind. The whole earth is appointed for the nouriſhment of its inhabitants: but it would be incapable of doing it, was it uncultivated. Every nation is then obliged by the law of nature to cultivate the ground that has fallen to its ſhare; and it has no right to expect or require aſſiſtance from others, any farther than as the land in its poſſeſſion is incapable of furniſhing it with neceſſaries. Thoſe people, like the antient Germans, and the modern Tartars, who having fertile countries, diſdain to cultivate the earth, and chuſe rather to live by rapine, are wanting to themſelves, and deſerve to be exterminated as ſavage and pernicious beaſts. There are others who, to avoid agriculture, would live only by hunting and their flocks. This might, doubtleſs, be allowed in the firſt ages of the world, when the earth, without cultivation, produced more than was ſufficient to feed its few inhabitants. But at preſent, when the human race is ſo greatly multiplied, it could not ſubſiſt, if all nations reſolved to live in that manner. Thoſe who ſtill retain this idle life, uſurp more extenſive territories, than they would have occaſion for, were they to uſe honeſt labour, and have therefore no reaſon to complain, if other nations, more laborious, and too cloſely confined, come to poſſeſs a part. Thus though the conqueſt of the civilized empires of Peru and Mexico were a notorious uſurpation, the eſtabliſhment of many colonies on the continent of North America, may on their confining themſelves within juſt bounds, be extremely lawful. The people of theſe vaſt countries rather overran than inhabited them.

§ 82. Of public granaries.

The eſtabliſhment of public granaries is an excellent regulation for preventing ſcarcity. But great care ſhould be taken to prevent their being managed with

a mercantile ſpirit, and with views of profit. This would render them a monopoly, which would not be the leſs unlawful from its being carried on by the magiſtrate. Theſe granaries ſhould be filled in times of the greateſt plenty, and take off the corn that would lie upon the huſbandman's hands, or be carried in too great quantities to foreigners; they ſhould be opened when corn is dear, and kept at a juſt price. If in a time of plenty they prevent this neceſſary commodity from eaſily falling to a very low price, this inconvenience is more than remedied by the relief they afford in dear times: or rather, no inconvenience ever ariſes from them. When corn is ſold extremely cheap, the manufacturer is tempted to underſell his neighbours, by offering his goods at a price which he is afterwards obliged to raiſe; and this produces great diſorders in commerce, by putting it out of its courſe; or he accuſtoms himſelf to an eaſy life, which he cannot ſupport in harder times. It would be of advantage both to the manufactures and to commerce to have the ſubſiſtence of the workmen kept at moderate, and nearly equal price. In ſhort, public granaries keep in the ſtate the corn that would be ſent abroad at too cheap a rate, and muſt be purchaſed again, and brought home at a very great expence after a bad harveſt: which is a real loſs to the nation. Theſe eſtabliſhments, however, will not hinder the corn trade. If the country, in a common year, produces more than is ſufficient for the nouriſhment of the inhabitants; the ſuperfluity may be ſent abroad; but it will be ſold at a more juſt and reaſonable price.

CHAP.

CHAP. VIII.

Of Commerce.

§ 83. Of home and foreign trade.

BY means of commerce particular perſons, and whole nations may procure what they have occaſion for, and is not to be found at home. Commerce is divided into home and foreign trade. The firſt is that carried on in the ſtate between the ſeveral inhabitants; and the ſecond is carried on with foreign nations.

§ 84. The utility of a home trade.

The home trade of a nation is of great uſe; it furniſhes all the citizens with the means of procuring whatever they want, as either neceſſary, uſeful, or agreeable; it cauſes a circulation of money, creates induſtry, animates labour, and by affording ſubſiſtence to a great number of ſubjects, contributes to render the country more populous and flouriſhing.

§ 85. The utility of foreign trade.

The ſame reaſons ſhew the uſe of foreign trade, which is moreover attended with theſe advantages: 1. By trading with foreigners, a nation procures ſuch things as neither nature nor art can furniſh in that country. And ſecondly, if it be properly directed, it increaſes the riches of the nation, and may become the ſource of wealth and plenty. Of this the example of the Carthagenians among the ancients, and that of the Engliſh and Dutch among the moderns, afford remarkable proofs. Carthage, by her riches, counter-balance the fortune,

fortune, courage, and grandeur of Rome. Holland has amaſſed immenſe ſums, in her marſhes; a company of her merchants poſſeſſes kingdoms in the eaſt, and the governor of Batavia commands as King of the Indies. To what a degree of power and glory is England arrived! formerly her kings and warlike people made the moſt glorious conqueſts, which the reverſe, ſo frequent in war, made them loſe: at preſent it is principally commerce that places in her hand the balance of Europe.

§ 86. The obligation to encourage a home trade.

Nations are obliged to cultivate a home trade; firſt, becauſe we ſhall then fulfil the law of nature, which requires that men ſhould mutually aſſiſt each other, and contribute as much as in their power to the perfection and happineſs of beings like themſelves; whence it follows, that after the introduction of property, the obligation muſt take place, of reſigning to others, at a juſt price, what they have occaſion for, and what we do not appropriate to our own uſe. Secondly, ſociety being eſtabliſh with the view that each may procure whatever things are neceſſary to his own perfection and happineſs, and a home trade being the means of obtaining them, the obligations to carry on and improve this trade are derived from the very contract on which the ſociety was formed. In fine, this commerce being of advantage to the nation, it is obliged, as a duty to itſelf, to render it flouriſhing.

§ 87. The obligation to carry on a foreign trade.

From the ſame reaſon drawn from the welfare of the ſtate, and to procure for the citizens every thing they want, a nation is obliged to promote and carry on a foreign trade. Of all the modern ſtates, England is moſt diſtinguiſhed in this reſpect. The parliament have always their eyes fixed on this important intereſt; they effectually protect the navigation of the merchants;

chants; and favour, by conſiderable gratifications, the exportation of ſuperfluous commodities and merchandizes. We may ſee in a very good work [a], the great advantages that kingdom has derived from ſo wiſe a conduct.

§ 88. The foundation of the laws on commerce. On the right of buying.

Let us now ſee what are the laws of nature and nations in reſpect to the commerce they carry on with each other. Men are obliged mutually to aſſiſt each other as much as poſſible, in order to contribute to the perfection and happineſs of beings like themſelves (Prelim. § 10.) whence it follows, as we have juſt ſaid (§ 86.) that after the introduction of property it became a duty to ſell to each other at a juſt price, what the poſſeſſor himſelf had no occaſion for, and what is neceſſary to others; becauſe, ſince this introduction of property no man could any other way procure whatever he found neceſſary or uſeful, or what was proper to render life ſweet and agreeable. Since then the law ſprings from the obligation (Prelim. § 3.); that we have juſt eſtabliſhed gives every man the right of procuring the things he wants, by buying them at a reaſonable price of thoſe who have themſelves no occaſion for them.

We have alſo ſeen (Prelim. § 5.) that men could not free themſelves from the authority of the laws of nature by uniting in civil ſociety, and that the whole nation remains ſubject to the ſame laws in its national capacity; ſo that the natural and neceſſary law of nations, is no other than the law of nature properly applied to nations or ſovereign ſtates (Prelim. § 6): from all which follows, that a nation has a

[a] Remarks on the advantages and diſadvantages of France and Great Britain in relation to commerce.

right

right to procure, at an equitable price, whatever it wants, on purchaſing them of people who have no occaſion for them. This is the foundation of the right of commerce between different nations, and in particular of the right of buying.

§ 89. Of the right of ſelling.

We cannot apply the ſame reaſoning to the right of ſelling ſuch things we want to part with. Every man and every nation being perfectly at liberty to buy a thing that is to be ſold, or not to buy it, and to buy it of one rather than of another; the law of nature gives to no perſon whatſoever the leaſt kind of right to ſell what belongs to him to another who does not want to buy, neither has any nation that of ſelling its commodities or merchandiſe to a people who are unwilling to have them.

§ 90. Of the prohibition of foreign merchandiſes.

Every ſtate has, conſequently, a right to prohibit the entrance of foreign merchandiſe, and the people who are intereſted in this prohibition have no right to complain of it, as if they had been refuſed an office of humanity. Their complaints would be ridiculous, ſince they would only be cauſed by want of that gain, refuſed by a nation that would not ſuffer it to be made at its own expence. It is however true, that if a nation was very certain that the prohibition of its merchandiſes was not founded on any reaſon drawn from the welfare of the ſtate that prohibited them, it would have cauſe to conſider this conduct, as a mark of ill-will ſhewn in this inſtance, and to complain of it on that footing. But it would be very difficult to form a certain judgment, that the ſtate had no ſolid nor apparent reaſon for making ſuch a prohibition.

§ 91. The nature of the right of buying.

By the manner in which we have ſhewn a nation's right to buy of another what it wants, it is eaſy to ſee, that this right is not one of thoſe called *perfect*, and that

that are accompanied with a right of conſtraint. Let us now diſtinctly explain the nature of a right that may give room for queſtions of a very ſerious nature. You have a right to buy of others ſuch things as you want, and of which they themſelves have no need; you addreſs yourſelf to me: I am not obliged to ſell them to you, if I have any occaſion for them. In virtue of the natural liberty that belongs to all men, I am to judge whether it is prudent for me to keep them or to ſell them to you; and you have no right to determine whether I judge well or ill, becauſe you have no authority over me. If I improperly, and without any good reaſon refuſe to ſell at a juſt price what you want, I offend againſt my duty; you may complain of this; but you ought to bear it, and you cannot attempt to force me, without violating my natural right, and doing me an injury. The right of buying the things we want, is then only an imperfect right, like that of a poor man to receive alms of the rich; if he refuſes him, the poor man may juſtly complain; but he has no right to take it by force.

If it be demanded, what a nation has a right to do in the caſe of an extreme neceſſity? this queſtion will be anſwered in its proper place in the following Book, Chap. IX.

§ 92. Every nation is to chuſe how far it will engage in commerce.

Since then a nation cannot have a natural right to ſell its merchandizes to another, that is unwilling to purchaſe them; if it has only an imperfect right to buy what it wants of others; if it belongs only to theſe laſt to judge whether it be proper for them to ſell or not; and, in ſhort, if commerce conſiſts in mutually buying and ſelling all ſorts of commodities; it is evident, that it depends on the will of any nation to carry on a commerce with each other, or to let it alone. If it is willing to allow this to one, it depends on the nation to permit it, under

under ſuch conditions as it ſhall think proper. For in permitting another nation to trade with it, it grants that other a right, and every one is at liberty to affix what conditions he pleaſes to a right he freely grants.

§ 93. How a nation acquires a perfect right to a foreign trade.

Men and ſovereign ſtates may, by their promiſes, enter into a perfect obligation with reſpect to each other, in things where nature has made only an imperfect obligation. A nation not having naturally a perfect right to carry on a commerce with another, may procure it by an agreement or treaty. This right is then acquired only by treaties, and relates to that branch of the law of nations termed *conventional* (Prelim. § 24.). The treaty that gives the right of commerce is then the meaſure and rule of this right.

§ 94. Of the ſimple permiſſion of commerce.

A ſimple permiſſion of carrying on a commerce with a nation, gives no perfect right to that commerce. For if I merely and ſimply permit you to do any thing, I do not give you any right to do it afterwards in ſpight of me: you may make uſe of my condeſcenſion as long as it laſts; but nothing can hinder my changing my will. As then every nation has a right to chuſe whether it will or will not trade with another, and on what conditions it is willing to do it (§ 92.); if a nation has ſuffered by another's coming to trade in the country, it is at liberty to prohibit, reſtrain, or ſubject that commerce to certain regulations, and the people who carry it on cannot complain of injuſtice.

Let us only obſerve, that nations, as well as individuals are obliged to trade together for the common benefit of the human race, on account of the neceſſity men are under with regard to mutual aſſiſtance, (Prelim, § 10, 11. and Book I. § 88.): but this does not prevent any one's being at liberty to conſider, in particular caſes, if it is convenient to encourage, or permit the commerce: and as the duties towards itſelf, are ſuperior

rior to thoſe it owes to another, if one nation finds itſelf in ſuch circumſtances, that it judges trading with foreigners dangerous to the ſtate, it may give it up, and prohibit it. This the Chineſe have done for a long time together. But once more, it is neceſſary that its duties towards itſelf ſhould preſcribe this conduct, from very ſerious and important reaſons; otherwiſe it could not refuſe to comply with the general duties of humanity.

§ 95. If the laws relating to commerce are ſubject to preſcription.

We have ſeen what are the laws nations derive from nature, with regard to commerce, and how they may procure others by treaties: let us ſee if they can found any on long cuſtom. To determine this queſtion in a ſolid manner, it is neceſſary firſt to obſerve, that there are rights which conſiſt in a ſimple *power:* they are called in Latin *jura meræ facultatis*, rights of mere ability. They are ſuch in their own nature, that he who poſſeſſes them may uſe them or not, as he thinks proper, he being abſolutely free from all conſtraint in this reſpect; ſo that the actions that relate to the exerciſe of theſe rights, are acts of mere freewill, that may be done or not done according to pleaſure. It is manifeſt that rights of this kind cannot be loſt by preſcription on account of their not being uſed, ſince the preſcription is only founded on a lawful conſent preſumed, and if I poſſeſs a right which in its own nature I may, or may not uſe, as I think proper, without any perſon having a right to preſcribe to me on that ſubject, it cannot be preſumed, that if I have been long without making uſe of it, I therefore intend to abandon it. This right is then impreſcriptible, at leaſt if I am not forbid, and hindered from making uſe of it, and have obeyed with ſufficient marks of conſent. Let us ſuppoſe, for inſtance, that I am entirely at liberty to grind my corn at any mill I pleaſe, and that during a very conſiderable time, an age if you will, I make uſe of the ſame mill; as I have done

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in this reſpect what I thought proper, nobody can preſume from this uſe of the ſame mill, that I would deprive myſelf of the right of grinding in any other; and conſequently my right cannot be loſt by preſcription. But now ſuppoſe, that reſolving to make uſe of another mill, the maſter of this oppoſes it, and makes me ſign a prohibition; if I obey his prohibition without neceſſity, and without oppoſition, though I know my right, and have it in my power to defend myſelf, this right is loſt; becauſe my conduct gives juſt room to preſume that I choſe to abandon it. Let us apply theſe principles. Since it depends on the will of any nation to carry on a commerce with another, or not to carry it on, and to regulate the manner in which it would make uſe of it (§ 92.) the right of commerce is evidently a right of mere ability (*jus meræ facultatis*), a ſimple power, and conſequently is impreſcriptible. Thus when two nations have traded together, without interruption, during a century, this long uſe does not give any right to either of them, and one is not obliged, on this account, to ſuffer the other to come and ſell its merchandiſes, or to buy others; both preſerve the double right of prohibiting the entrance of foreign merchandize, and of ſelling theirs wherever the people are willing to buy them. If the Engliſh have from time immemorial been accuſtomed to fetch their wines from Portugal, they are not on that account obliged to continue the trade, and have not loſt the liberty of purchaſing their wines elſewhere. If, in the ſame manner, they have for a very long time ſold their cloth in that kingdom; they have nevertheleſs a right to transfer that trade to any other country: and, reciprocally, the Portugueſe are not obliged by this long cuſtom, either to ſell their wines to the Engliſh, or to purchaſe their cloths. If a nation deſires

any

any right of commerce, that does not depend on the will of another, it is neceſſary to procure it by treaty.

§ 96. The impreſcriptibility of thoſe founded on treaty.

What has been juſt ſaid may be applied to the rights of commerce acquired by treaties. If a nation has by this method procured the liberty of ſelling certain merchandiſes to another, it does not loſe its right, though a great number of years are ſuffered to be paſſed over without its being uſed; becauſe this right is a ſimple power, *jus meræ facultatis*, which it is at liberty to uſe or not, whenever it pleaſes.

Certain circumſtances however may render a different deciſion neceſſary, becauſe they imply a change in the nature of the right in queſtion. For example, if it appears evident, that the nation granting this right, granted it only with a view of procuring a ſpecies of merchandiſe of which it was then in want; that which obtained the right of ſelling neglecting to furniſh theſe merchandiſes, and another offering to bring them regularly, on condition of having an excluſive privilege: it may certainly grant that excluſive privilege: the nation that had this right of ſelling, would thus loſe it, becauſe it had not fulfilled the tacit condition.

§ 97. Of monopolies, and trading companies with excluſive privileges.

Commerce is a common benefit to a nation, and all its members have an equal right to it. A monopoly is therefore, in general, contrary to the rights of the citizens. However this rule has its exceptions, taken even from the welfare of the nation, and a wiſe government may in certain caſes, juſtly eſtabliſh a monopoly. There are commercial enterpriſes that cannot be carried on without a ſtrength that requires conſiderable funds, which ſurpaſs the ability of ſingle perſons. There are others that would ſoon become ruinous, were they not conducted with great prudence, with one regular ſpirit, and according to well-ſupported maxims and rules: theſe foreign trades cannot be ſeparately carried on by individuals;

individuals; companies are therefore formed, under the authority of government, and these companies cannot be supported without an exclusive privilege. It is then for the advantage of the nation to grant them: hence has arisen in several countries, those powerful companies that carry on the commerce of the East. When the subjects of the United Provinces establish themselves in the Indies on the ruin of their enemies the Portuguese, separate merchants did not dare to think of so grand an enterprise, and the state itself wholly taken up in the defence of its liberty against the Spaniards, had not the means of attempting it.

There can be no doubt that when a branch of commerce, or a manufacture, is out of a nation's power to carry it on any other way, if a number of persons offer to establish it, on condition of having an exclusive privilege, the sovereign may very justly grant it.

But whenever a commerce may be left open to a nation, without being of the least disadvantage to the state; the granting certain privileges to some citizens, is offering an injury to the rights of others. And even then, when such a commerce requires considerable expences to maintain forts, men of war, &c. this being a national affair, the state may defray these expences, and, as encouragement to industry, leave the profits of the trade to the merchants. This is sometimes done in England.

§ 98. Of the balance of trade and the attention of the government in this respect.

The conductor of a nation ought to take particular care to encourage the commerce that is of advantge to his people, and to suppress or lay restraints upon that which is to their disadvantage. Gold and silver being become the common standard of the value of all the articles of commerce, the trade that brings into the state a greater quantity of these metals than it carries out, is of advantage, and, on the contrary, that is ruinous which causes more gold and silver to be sent abroad, than it brings home.

home. This is what is called the balance of trade. The ability of thoſe who have the direction of it, conſiſts in making that balance turn in favour of the nation.

§ 99. Of the rights of entry.

Of all the meaſures that may be taken by a government, we ſhall only touch here on the rights of entry. When the conductors of a ſtate, without aboliſhing a particular trade, would divert it from that channel, they lay ſuch an extraordinary duty on the merchandiſes they would diſcourage, as will prevent their conſumption. Thus French wines are uſually charged with very high duties in England, while the duties on thoſe of Portugal are much more moderate; becauſe England ſells few of its productions to France, whilſt ſhe ſells abundantly more to Portugal. There is nothing in this conduct that is not very wiſe and extremely juſt, and France has no reaſon to complain of it, every nation having an undoubted right to make what conditions it thinks proper, with reſpect to receiving foreign merchandiſes, and may even refuſe to receive them all.

CHAP.

CHAP. IX.

Of the Care of the public Ways of Communication, and the right of Toll.

§ 100. Of the use of highways, canals, &c.

THE use of high-ways, bridges, canals, and, in a word, of all safe and commodious ways of communication, cannot be doubted. They facilitate the trade between one place and another, and render the conveyance of merchandise less expensive, as well as more sure and easy. The merchants are enabled to sell at a better price, and to obtain the preference; they draw strangers, who travel through the country, and leave money at the places through which they pass. France and Holland have daily found the truth of this by happy experience.

§ 101. The duties of the government in this respect.

One of the principal things that ought to employ the attention of the government, with respect to the welfare of the public in general, and of trade in particular, must then relate to the high-ways, canals, &c. in which nothing ought to be neglected to render them safe and commodious. France is one of those states where this duty to the public is discharged with the greatest attention and magnificence. Numbers of the patroles every where render the traveller free from danger; and noble causeways, bridges, and canals facilitate the communication between one province and another; Louis XIV. joined the two seas by a work worthy of the Romans.

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The whole nation ought, doubtleſs, to contribute to ſuch uſeful undertakings. When therefore the laying out and repairing of highways, bridges and canals, would be too great a burden to be diſcharged out of the ordinary revenues of the ſtate, the government may oblige the people to labour at them, or to contribute to the expence. There have been peaſants in ſome of the provinces of France, who murmured at the labours impoſed upon them for the conſtruction of cauſeways; but experience no ſooner made them ſenſible of their true intereſt, than they bleſſed the authors of ſo uſeful a deſign.

§ 102. Of its rights in this reſpect.

The conſtruction and preſervation of all theſe works being attended with great expence, the nation may very juſtly oblige all thoſe to contribute to them, who receive advantage from their uſe: this is the lawful ſource of the right of toll. It is juſt that a traveller, and eſpecially a merchant, who receives advantage from a bridge, a canal, or a cauſeway, in his own paſſage, and in conveying more commodiouſly his merchandiſe, ſhould contribute to the expence of theſe uſeful eſtabliſhments, by a moderate contribution; and if the ſtate thinks proper to exempt the citizens from paying it, it is under no obligation to gratify ſtrangers in this particular.

§ 103. The foundation of the right of toll.

But a law ſo juſt in its origin, frequently degenerates into a great abuſe. There are countries where no care is taken of the highways, and where they nevertheleſs require conſiderable tolls. A particular lord who has a neck of land that projects into a river, there ſhall eſtabliſh a toll, though he is not at a farthing's expence in preſerving the river, and the convenience of navigation. This is a manifeſt extortion, contrary to the natural law of nations. For a diviſion and property in lands can deprive nobody of the right of paſſage, when not the

§ 104. On the abuſe of this right.

leaſt injury is done to him, or the territory by which we paſs. Every man receives this right from nature, and cannot juſtly be forced to purchaſe it.

But the *arbitrary* or *cuſtomary* law of nations at preſent tolerates this abuſe, while it is not carried to ſuch an exceſs as to deſtroy commerce. However, people ſubmit to them without difficulty, only on account of their being eſtabliſhed by ancient cuſtom: but the impoſition of new tolls is often a ſource of diſputes. The Swiſs formerly made war on the dukes of Milan, on account of the oppreſſions of this nature. This right of tolls is alſo ſtill abuſed, when the paſſenger is obliged to contribute too much, and what bears no proportion to the expence of preſerving their public paſſages.

At preſent, to avoid all difficulty and oppreſſion, nations ſettle theſe points by treaties.

CHAP.

CHAP. X.

Of Money and Exchange.

§ 105. Of the eſtabliſhment of money.

IN the firſt age, after the introduction of property, people exchanged their commodities and ſuperfluous effects for thoſe they wanted: but afterwards gold and ſilver became the common ſtandard of the value of all things; and at length the people, to prevent their being deceived, contrived to impreſs on pieces of gold and ſilver the name of the ſtate, the figure of the prince, or ſome other impreſſion, as the ſeal and pledge of its value. This inſtitution is of great uſe and infinite convenience: it is eaſy to ſee what an advantage it is to trade. Nations or ſovereignties cannot therefore apply too cloſely to an affair of ſuch importance.

§ 106. The duty of the nation or prince with reſpect to money.

The impreſſion made on money becoming the ſeal of its ſtandard and weight, it was ſoon found, that every perſon without diſtinction ought not to be permitted to coin it; for by that means frauds would become too common; it would ſoon loſe the public confidence; and this would deſtroy a moſt uſeful inſtitution. Hence money is coined by the authority, and in the name of the ſtate or prince, who are its ſurety; they ought then to have a quantity of it coined ſufficient to anſwer the neceſſities of the country, and to take care that it be good, that is, that its intrinſic

value bears a juſt proportion to its extrinſic or numerary value.

It is true, in a preſſing neceſſity the ſtate may order the citizens to receive money at a price ſuperior to its real value; but as foreigners will not receive it at that price, the nation gains nothing by this proceeding: it is only daubing over the wound for a moment, without healing it. This exceſs of value added in an arbitrary manner to the money, is a real debt which the ſovereign contracts with particular perſons: and in ſtrict juſtice, the criſis of affairs being over, that money ought to be called in at the expence of the ſtate, and paid for in other ſpecie, made according to the current ſtandard; otherwiſe this kind of burden, laid only by neceſſity, would fall ſolely on thoſe who received this arbitrary money in payment: which would be unjuſt. Beſides, experience has ſhewn that ſuch a reſource is deſtructive to trade; for by deſtroying the confidence that ought to ſubſiſt between foreigners and the citizens, it raiſes in the ſame proportion the price of every thing bought of them, and engages every one to lock up or ſend abroad the good old ſpecie, whereby a ſtop is put for a time to the circulation of money. So that it is the duty of every nation and of every ſovereign to abſtain, as much as poſſible, from ſo dangerous a practice, and rather to have recourſe to extraordinary taxes and contributions to ſupport the preſſing exigencies of the ſtate.

§ 107. His rights in this reſpect.

Since the ſtate is ſurety for the goodneſs of the money and its currency; the public authority alone has the right of coining it. Thoſe who counterfeit it, violate the rights of the ſovereign, whether they make it of the ſame ſtandard and value or not. Theſe are called coiners, and their crime is juſtly conſidered

ſidered as one of the greateſt. For if they coin baſe money, they rob both the public and the prince: and if they coin good, they uſurp the prerogative of the ſovereign. They cannot afford to make good, without there be a profit allowed for making it, and then they rob the ſtate of the profit to which it only belongs. In both caſes they do an injury to the ſovereign; for the public credit being ſurety for the money, the ſovereign alone has a right to order its being coined. Thus the right of coining is placed among the *prerogatives of majeſty*, and Bodimus [1] relates, that Sigiſmund Auguſtus, king of Poland, having granted this privilege to the duke of Pruſſia, in the year 1543, the ſtates of the country cauſed a decree to be paſſed in which it was aſſerted, that the king could not grant that privilege, it being inſeparable from the crown. The ſame author obſerves, that long before that time, many lords and biſhops of France nad the privilege of coining money, and were always conſidered as doing it by the king's authority; but the kings of France at laſt withdrew all theſe privileges, on account of their being often abuſed.

§ 108. The injury one nation might do another with reſpect to money.

From the principles juſt laid down, it is eaſy to conclude, that if one nation counterfeits the money of another, or if it allows and protects the coiners who preſume to do it, it does that nation an injury. But commonly the criminals of this claſs find no protection from any; all princes being equally intereſted in exterminating them.

§ 109. Of exchange and the laws of commerce.

There is another cuſtom more modern, and of no leſs uſe to commerce than the eſtabliſhment of money; namely, *exchange*, or the buſineſs of the bankers,

[1] In his Republic, Book I. Chap. X.

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by means of whom a merchant remits immenſe ſums from one end of the world to the other, with very little expence, and if he pleaſes, without danger. For the ſame reaſon that ſovereigns are obliged to protect commerce, they are obliged to protect this cuſtom, by good laws, in which every merchant, foreigner or citizen, may find ſecurity. In that it is equally the intereſt and the duty of every nation to eſtabliſh among themſelves wiſe and equitable laws of commerce.

CHAP. XI.

The ſecond Object of a good Government, is to procure the true Felicity of the Nation.

§ 150. A nation ought to labour under its own felicity.

LET us continue to lay open the principal objects of a good government. What we have ſaid in the five preceding chapters relates to the care of providing for the neceſſities of the people, and procuring plenty in the ſtate: this is a point of neceſſity; but it is not ſufficient for the happineſs of a nation. Experience ſhews that a people may be unhappy in the midſt of all earthly enjoyments, and in the poſſeſſion of the greateſt riches. Whatever may contribute to make men enjoy a true and ſolid felicity, is a ſecond object that deſerves the moſt ſerious attention of the government. Happineſs is the centre to which all the

the duties of a man and a people tend; and this is the great end of the law of nature. The desire of happiness is the powerful spring that puts all men in motion; felicity is the end they all have in view, and it ought to be the grand of the public desire (Prelim. § 5.). It is then those who form this public desire, or those who represent them, and are the conductors of the nation, who are to labour after its felicity, to watch continually over it, and to advance it to the utmost of their power.

§ 111. Instructions.

To succeed in this, it is necessary to instruct the people to seek felicity where it is to be found, and to teach them the means of obtaining it. The sovereign cannot then take too much pains, in instructing and enlightening his people, and in forming them to useful knowledge and wise discipline. Let them leave a hatred of the sciences to the despotic tyrants of the East: they are afraid of having their people instructed, because they would rule over slaves. But though they are obeyed with the most abject submission, they frequently experience the effects of disobedience and a revolt. A just and wise prince feels no apprehensions from the light of knowledge, and knows that it is always of advantage to a good government. As men of learning are convinced that liberty is the natural inheritance of mankind, so they are more fully sensible than others, how necessary, and of what advantage it is, that this liberty should be subject to a lawful authority: incapable of being slaves, they are faithful subjects.

§ 112. Education of youth.

The first impressions made on the mind are of the utmost importance during the whole life. In the tender years of infancy and youth, we easily receive the seeds of good and evil. Hence the education of youth is one of the most important affairs that deserves

ſerves the attention of the government. It ought not to be entirely left to fathers; for the moſt certain way of forming good citizens, is to found uſeful eſtabliſhments for public education, to provide able maſters, to give them wiſe directions, and to take ſuch mild and prudent meaſures, that the citizens will not neglect to take advantage of them. How admirable was the education of the Romans in the flouriſhing ages of that republic, and how admirably was it calculated to form great men! The young men put themſelves under the patronage of ſome illuſtrious perſon; they waited upon him in his houſe, accompanied him wherever he went, and equally improved by his inſtructions and example: their very ſports and amuſements were exerciſes proper to form ſoldiers. We ſee the ſame at Sparta, and this was one of the wiſe inſtitutions of the incomparable Lycurgus. That legiſlator and philoſopher entered into the particulars of the good education of youth [m], being perſuaded that on that depended the proſperity and glory of his republic.

§ 113. Of the arts and ſciences.

Who can doubt that a ſovereign, and even a whole nation, ought to encourage the arts and ſciences? Without mentioning the many uſeful inventions that ſtrike the eye of every one, literature and the polite arts enlighten the mind, and ſoften the manners. If ſtudy does not always inſpire the love of virtue, it is becauſe it ſometimes, and even too often, unhappily meets with a very bad and vicious heart. The nation and its conductors ought then to protect men of learning and great artiſts; and to encourage them to improve their talents by honours and rewards. Let the friends of

[m] See *Xenophon. Lacedemon. Republica.*

barbariſm

barbariſm declaim againſt the ſciences and polite arts; without ſtooping to anſwer their vain reaſonings, let us content ourſelves with appealing to experience. Let us compare England, France, Holland, and ſeveral towns of Switzerland and Germany, to the many regions given up to ignorance, and ſee if we can there find more honeſt men and good citizens. It would be a groſs error to oppoſe againſt us the example of Sparta, and that of ancient Rome. They, it is true, neglected curious ſpeculations, literature and the arts of mere luxury: but the ſolid ſciences and cuſtoms, morality, civil law, politics and war, were there cultivated, eſpecially at Rome, with more care than among us.

People, at preſent, generally enough acknowledge the uſe of literature and the polite arts, and the neceſſity of encouraging them. The immortal Peter I. thought that without their aſſiſtance he could not entirely civilize Ruſſia, and render it flouriſhing. In England learning and abilities lead to honour and riches. Newton was honoured, protected, and rewarded while living, and after his death his tomb was placed among thoſe of kings. France alſo in this reſpect deſerves particular praiſes, and owes to the munificence of its kings ſeveral eſtabliſhments that are no leſs uſeful than glorious: the Royal Academy of Sciences diffuſes on every ſide the light of knowledge, and the deſire of inſtruction. Louis XV. furniſhed the means of ſending to ſearch, under the equator and the polar circle, for a proof of an important truth; and we *know* now what was before *believed*, on the faith of Newton's calculations. Happy would that kingdom be if the too general taſte of the age did not make the people neglect ſolid knowledge to give themſelves up to that which is merely amuſing, and if thoſe who fear the

the light, did not ſucceed in darkening the blaze of ſcience!

§ 114. Of the liberty of philoſophizing.

I ſpeak of the liberty of publiſhing philoſophical works; which is the ſoul of the republic of letters. What can genius produce when cramped by fear? Can the greateſt man that ever lived enlighten many of his fellow-citizens, if he ſees himſelf always expoſed as a butt to ignorant and bigotted wranglers; if he is obliged to be continually on his guard, to avoid being accuſed by thoſe who draw conſequences of indirectly attacking the received opinions? I know that this liberty has its juſt bounds; that a wiſe government ought to have an eye to the preſs, and not ſuffer ſuch works to be publiſhed, as are ſcandalous, contrary to morality, the form of government, and the eſtabliſhed religion. But yet great care ſhould be taken not to extinguiſh a light that may afford the ſtate the richeſt advantages. Few men know how to keep a juſt medium, and the office of literary cenſor ought to be truſted to none but thoſe who are equally wiſe and learned. Why ſhould they ſearch in a book for that which it appears the author had no deſign of placing there; and when a writer is wholly employed about, and only ſpeaks of philoſophy, ought a malicious adverſary to be liſtened to, who would ſet him at variance with religion? So far from diſturbing a philoſopher on account of his opinions, the magiſtrate ought to chaſtiſe thoſe who publicly charge him with impiety, when in his writings he ſhews reſpect to the religion of the ſtate. The Romans ſeem to have been formed to give examples to the univerſe: that wiſe people carefully maintained the worſhip and religious ceremonies eſtabliſhed by law, and left the field open to the ſpeculations of the philoſophers. Cicero, a ſenator, conſul and augur, ridicules ſuperſtition, attacks it, and demoliſhes it in his writ-

ings;

ings; and in this he endeavoured to promote his own happineſs and that of his fellow citizens: but he obſerves "that to deſtroy ſuperſtition is not to aboliſh "religion; for a wiſe man, ſays he, will reſpect the "inſtitutions, and religious ceremonies of his anceſtors. "The beauty of the world, and the admirable order of "the ſtars are ſufficient to make us acknowledge "the exiſtence of an eternal and all-perfect Being, "who merits the veneration of the human race [n]." And in his Dialogues on the Nature of the Gods, he introduces Cotta the academic, who was high-prieſt, attacking with great freedom the opinions of the ſtoics, declaring that he ſhould be always ready to defend the eſtabliſhed religion from which he found the republic had received great advantages; that neither the learned nor the ignorant ſhould make him abandon it: he then ſays to his adverſary, "Theſe are my thoughts both "as pontiff, and as Cotta. But do thou, as a philo-"ſopher, bring me to thy ſentiments by the ſtrength of "thy reaſons. For a philoſopher ought to prove to me "the truth of the religion he would have me embrace, "while I ought in this reſpect to believe my anceſtors, "even without proof [o]."

[n] Nam, ut verè loquamur, ſuperſtitio ſuſa per gentes, oppreſſit omnium fere animos, atque hominum imbecillitatem occupavit——multum enim & nobiſmet ipſis, & noſtris profuturi videbamur ſi eam funditus tollebamus. Nec vero (id enim diligenter intelligi volo) ſuperſtitione tollendâ religio tollitur. Nam, & majorum inſtituta tueri ſacris, cæremoniiſque retinendis, ſapientis eſt: & eſſe præſtantem aliquam æternamque naturam, & eam ſuſpiciendam, admirandamque hominum generi, pulchritudo mundi, ordoque cœleſtium cogit conſiſteri. *De Divinatione, Lib.* II.

[o] Harum ego religionum nullam unquam contemnendam putavi: mihique ita perſuaſi, Romulum auſpiciis, Numam ſacris conſtitutis fundamenta jeciſſe noſtræ civitatis: quæ nunquam profecto ſine ſummâ placatione Deorum immortalium tanta eſſe potuiſſet. Habes, Balbe, quid Cotta, quid pontifex ſentiat. Fac nunc ergo intelligam, quid tu ſentias: à te enim philoſopho rationem accipere debeo religionis; majoribus autem noſtris, etiam nullâ ratione reddita, credere. *De Natura Deorum, Lib.* III.

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Let us add experience to these examples and authorities. Never did a philosopher occasion disturbances in the state, or in religion, by his opinions; they make no noise among the people, and never offend the weak, unless malice or intemperate zeal forces them to discover the pretended venom. He troubles the state, and puts religion in danger, who endeavours to place the opinions of a great man, in opposition to the doctrines and worship established by law.

§ 115. They ought to inspire the love of virtue, and the abhorrence of vice.

It is not enough to instruct the nation: it is still more necessary, in order to conduct it to happiness, to inspire the love of virtue, and the abhorrence of vice. Those who have searched deeply into morality are convinced that virtue is the only path that leads to true felicity; so that its maxims contain nothing less than the art of living happily; and he must be very ignorant of politics, who does not know, that a virtuous nation will be more capable than any other of forming a state that is at once happy, tranquil, flourishing, solid, respected by its neighbours, and formidable to its enemies. The interest of the prince must then concur with his duty, and the dictates of his conscience, to engage him to watch attentively over an affair of such importance. Let him employ all his authority in order to encourage virtue and suppress vice; let him for this purpose form public establishments; and to the same end direct his own conduct, his example, and the distribution of favours, posts, and dignities. Let him carry his attention even to the private life of the citizens, and banish from the state whatever is proper only to corrupt the manners of the people. It is the business of politics to teach him all the means he ought to use in obtaining this desirable end; to shew him those he should prefer, and those he ought to avoid, on account of the dangers that might attend the execution, and the abuses that

that might be made of them. We ſhall here only obſerve, in general, that vice may be ſuppreſſed by chaſtiſements, but that mild and gentle methods can only raiſe men to the dignity of virtue: it may be inſpired, but cannot be commanded.

§ 116. The nation may from this diſcover the intention of thoſe who govern.

It is an inconteſtible truth, that the virtues of the citizens conſtitute the moſt happy diſpoſitions that can be deſired by a juſt and wiſe government. This then affords a certain index, from which the nation may judge of the intentions of thoſe who govern. If they endeavour to render the great and the common people virtuous, their views are pure and upright; and it is certain that their ſight is fixed alone on the great end of government, the happineſs and glory of the nation. But if they ſpread a corruption of manners, a love of luxury, effeminacy, the rage of licentious paſſions, and excite the great to engage in ruinous expences; the people ought to take care of theſe corruptors; for they endeavour to purchaſe ſlaves, in order to rule over them in an arbitrary manner.

While a prince has juſt and moderate deſires, he has not recourſe to theſe odious methods. Satisfied with his ſuperior ſtation and the power given him by the laws, he propoſes to reign with glory and ſafety; he loves his people, and deſires to render them happy. But his miniſters too commonly cannot bear to be reſiſted; the leaſt oppoſition, if he abandons his authority to them, renders them proud and more incapable of being moved than their maſter; they have not the ſame love for his people as himſelf. How corrupt is human nature! They diſtruſt the courage and firmneſs inſpired by virtue, and know that the diſtributor of favours rules as he pleaſes, over the men whoſe hearts are open to covetouſneſs. So a miſerable wretch who exerciſes the moſt infamous of all profeſſions, perverts the inclinations of a young

young victim to her odious traffic; she prompts her to luxury and gluttony, she fills her with softness and vanity, to deliver her up more surely to a rich seducer. This base and unworthy creature is sometimes chastised by the magistrate; but the minister, who is infinitely more guilty, swims in opulence, and is invested with honour and authority. Posterity, however, will do him justice and detest the corrupter of a respectable nation.

§ 117. The state, or the public person, ought to perfect its understanding and will.

If the governors endeavoured to fulfil the obligations which the law of nature lays upon them with respect to themselves, and in their character of conductors of the state, they would be incapable of ever giving in to the odious abuse just mentioned. Hitherto we have considered the obligation a nation is under to acquire knowledge and virtue, or to perfect its understanding and will; we have, I say, considered this obligation relatively to the particulars that compose a nation: it also belongs in a proper and singular manner to the conductors of the state. A nation while it acts in common, or in a body, is a moral person (Prelim. § 2.) that has its understanding and will, and is not less obliged than each individual to obey the laws of nature (Prelim. § 5.) and to improve its faculties (Book I. § 21.). This moral person resides in those who are invested with the public authority, and represent the entire nation. Whether this be the common council of the nation, an aristocratic body, or a monarchy, this sovereign, whatever he be, is then indispensably obliged to procure all the lights, and all the knowledge necessary to govern well, and to form in himself the practice of all the virtues suitable to a sovereign.

And as this obligation is imposed with a view to the public welfare, he ought to direct all his knowledge and all

all his virtues to the ſafety of the ſtate, the end of civil ſociety.

§ 118. And to direct the knowledge and virtues of the citizens to the welfare of the ſociety.

He ought even to direct, as much as poſſible, all the abilities, the knowledge and the virtues of the citizens to this great end; in ſuch a manner, that they may not only be uſeful to the individuals who poſſeſs them, but alſo to the ſtate. This is one of the great ſecrets in the art of reigning. The ſtate will be powerful and happy if the good qualities of the ſubject, paſſing beyond the narrow ſphere of the virtues of individuals, become the virtues of citizens. This happy diſpoſition raiſed the Roman republic to the higheſt pitch of power and glory.

§ 119. The love of the country.

The grand ſecret of giving the virtues of the individuals ſo happy a turn, with reſpect to the ſtate, is to inſpire the citizens with an ardent love for their country. It will then naturally follow, that each will endeavour to ſerve the ſtate, and to apply all his powers and abilities to the advantage and glory of the nation. This love of our country is natural to all men. The good and wiſe Author of Nature has taken care to bind them, by a kind of inſtinct, to the places where they received their firſt breath, and they love their own nation, as a thing with which they are intimately connected. But frequently ſome cauſes unhappily weaken or deſtroy this natural impreſſion. The injuſtice or the ſeverity of the government too eaſily effaces it in the hearts of the ſubjects: does ſelf-love attach a ſingle perſon to his country, where every thing ſeems to be made for one man? Far from it, we ſee that only free nations are fond of glory and the happineſs of their country. Let us call to mind the citizens of Rome in the happy days of the republic, and conſider now the Engliſh and Swiſs.

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§ 120. In particular perſons.

The love and affection a man feels for the ſtate of which he is a member, is a neceſſary conſequence of the wiſe and rational love he owes to himſelf; ſince his own happineſs is connected with that of his country. This ſenſation ought alſo to flow from the engagements he has entered into with ſociety. He has promiſed to procure its ſafety and advantage as much as is in his power: and how can he ſerve it with zeal, fidelity, and courage, if he has not a real love for it?

§ 121. In the nation or ſtate itſelf, and in the ſovereign.

The nation in a body, ought doubtleſs to love itſelf, and deſire its own happineſs as a nation. The ſenſation is too natural to diſpenſe with this obligation: but this duty relates more particularly to the conductor, the ſovereign, who repreſents the nation, and acts in its name. He ought to love it, as what is moſt dear to him, to prefer it to every thing, for it is the only lawful object of his care, and of his actions, in every thing he does by virtue of the public authority. The monſter who does not love his people can be only an odious uſurper; he doubtleſs deſerves to be caſt from the throne. There is no kingdom where the ſtatue of Codrus ought not to be placed before the palace of the ſovereign. That magnanimous king of Athens gave his life for his people. His country being attacked by the Heraclides, he conſulted the oracle of Apollo; and being anſwered, that the people whoſe chief ſhould be ſlain would remain victorious, Codrus diſguiſed himſelf, and ruſhing into the battle was killed by one of the enemies ſoldiers. Henry IV. king of France, joyfully expoſed his life for the ſafely of his people. That great prince and Louis XII, are illuſtrious models of the tender love a ſovereign owes to his ſubjects.

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The term *country*, ſeems to be very well underſtood by every body. However, as it is taken in different ſenſes, it may not be unuſeful to give it here an exact definition. It commonly ſignifies *the ſtate of which one is a member*; and in this ſenſe we have uſed it in the preceding paragraphs, and it ought to be thus underſtood in the law of nations.

§ 122. Definition of the term country.

In a more confined ſenſe, and more agreeably to its etymology, this term ſignifies the ſtate, or even more particularly the town or place, where our parents lived at the moment of our birth. In this ſenſe, it is juſtly ſaid, that our country cannot be changed, and always remains the ſame, to whatſoever place we remove afterwards. A man ought to preſerve gratitude and affection for the place where he received his education, and of which his parents were members when they gave him life. But as ſeveral lawful reaſons may oblige him to chuſe another country, that is to become a member of another ſociety; ſo when we ſpeak in general of the duty to our country, we ought to underſtand by this term, the ſtate of which a man is an actual member; ſince it is that to which he owes it entirely, and in preference to all others.

§ 123. How ſhameful and criminal it is to injure our country.

If every man is obliged to entertain a ſincere love for his country, and to procure it all the happineſs in his power, it is a ſhameful and deteſtable crime to injure that very country. He who becomes guilty of it, violates his moſt ſacred engagements, and ſinks into baſe ingratitude; he diſhonours himſelf by the blackeſt perfidy, ſince he abuſes the confidence of his fellow-citizens, and treats as enemies thoſe who had a right to expect his aſſiſtance and ſervices. We ſee traitors to their country only among thoſe men who are ſolely ſenſible of a baſe intereſt, who have an immediate value for none but themſelves, and whoſe heart is incapable of every

ſentiment of affection for others. They are therefore juſtly deteſted by the whole world, as the moſt infamous of all villains.

§ 124. The glory of good citizens: examples.

On the contrary, thoſe generous citizens are treated with honour and commendations, who, not barely contented with performing what they in general owe to their country, make noble efforts in its favour, and are capable of making it the greateſt ſacrifices. The names of Brutus, Curtius and the two Decii will live as long as that of Rome. The Swiſs will never forget Arnold de Winkelried, that hero whoſe actions deſerve to be tranſmitted to poſterity by a Titus Livy. He truly devoted himſelf to his country; he did it as a captain and a ſoldier, and not as a ſuperſtitious viſionary. That gentleman, who was of the country of Underwald, ſeeing at the battle of Sempach that his fellow-countrymen could not break through the Auſtrians, becauſe, being armed from head to foot, they had diſmounted, and forming a cloſe battalion, preſented a front covered with iron, and briſtling with pikes and lances; formed the generous deſign of ſacrificing himſelf for his country. "My friends, ſaid he to the Swiſs, who began "to be diſpirited, I am going this day to give my life "to procure you the victory: I only recommend to you "my family: follow me, and act in conſequence of "what you ſee me do." At theſe words he ranged them in that form which the Romans called *cuneus*, and forming himſelf the point of the triangle, marched to the centre of the enemy, and ſnatching all the pikes he could ſeize, threw them on the ground, thus opening for thoſe who followed him a way to penetrate into the midſt of this thick battalion. The Auſtrians once broke, were conquered, the weight of their armour became

came fatal to them, and the Swiſs obtained a complete victory [a].

CHAP. XII.

Of Piety and Religion.

§ 125. Of Piety.

PIETY and religion have an eſſential influence on the happineſs of a nation, and from their importance, deſerve a particular chapter. Nothing is ſo proper as piety to ſtrengthen virtue, and give it its full extent. I underſtand by the word *piety*, a diſpoſition of ſoul that leads us to have a view of the divine Being in all our actions, and to endeavour in every thing we do to pleaſe him. This virtue is an indiſpenſable obligation on all mankind; it is the pureſt ſource of their felicity; and thoſe who unite in civil ſociety, are ſtill more obliged to practiſe it. A nation ought then to be pious. The ſuperiors intruſted with the public affairs ſhould conſtantly propoſe to deſerve the approbation of their divine Maſter, and whatever they do in the name of the ſtate, ought to be regulated by this grand view.

[a] In the year 1386, the Auſtrian army conſiſted of four thouſand choice men, among whom were a great number of princes, counts, and nobility of diſtinguiſhed rank, all armed from head to foot. The Swiſs were no more than thirteen hundred men, ill armed. In this battle the Duke of Auſtria periſhed with two thouſand of his forces, in which number were ſix hundred and ſeventy ſix gentlemen of the beſt families in Germany. *Hiſtory of the Helvetic Confederacy, by de Watteville, Vol.* I. *page* 183, *and following.*

The care of forming pious diſpoſitions in all the people, ſhould be conſtantly one of the principal objects of their vigilance, and from this the ſtate will receive very great advantages. A ſerious attention to obtain in all our actions the approbation of an infinitely wiſe Being, cannot fail of producing excellent citizens: for rational piety in the people is the firmeſt ſupport of a lawful authority; and in the ſovereign's heart, it is the pledge of the people's ſafety, and produces their confidence. Ye maſters of the earth, who acknowledge no ſuperior here below, what aſſurance can your ſubjects have of your intentions, if they do not ſee you filled with reſpect for the common Father and Lord of men, and animated with a deſire to pleaſe him?

§ 126. It ought to be attended with knowledge.

We have already inſinuated that piety ought to be attended with knowledge. In vain would we propoſe to pleaſe God, if we know not the means of doing it. What a deluge of evils ariſes when men heated by ſo powerful a motive, are prompted to take methods that are equally falſe and pernicious! A blind piety forms none but ſuperſtitious perſons, fanatics and perſecutors, a thouſand times more dangerous to ſociety than the libertines. There have appeared barbarous tyrants who talked of nothing but the glory of God, while they cruſhed the people, and trampled the moſt ſacred laws of nature under foot. From a refinement of piety the anabaptiſts of the ſixteenth century refuſed all obedience to the powers of the earth. James Clement and Ravaillac, thoſe execrable parricides, thought themſelves animated by the moſt ſublime devotion.

§ 127. Of religion internal and external.

Religion conſiſts in the doctrines of divinity and the things of another life, and in the worſhip appointed to the honour of the ſupreme Being. As it is ſeated in the heart it is an affair of conſcience, in which every one ought to be directed by his own underſtanding: but

but as it is external, and publicly eſtabliſhed, it is an affair of the ſtate.

§ 128. Liberty of conſcience the right of individuals.

Every man is obliged to endeavour to obtain juſt ideas of God, to know his laws, his views with reſpect to his creatures, and the end for which they were created: man, doubtleſs, owes the moſt pure love, the moſt profound reſpect to his Creator; and to keep alive theſe diſpoſitions, and act in conſequence of them, he ſhould honour God in all his actions, and ſhew, by the moſt ſuitable meaſures, the ſentiments that fill his mind. This ſhort explanation is ſufficient to prove, that man is eſſentially and neceſſarily free to make uſe of his own choice in matters of religion. His belief is not to be commanded; and what kind of worſhip muſt that be, which is produced by force! worſhip conſiſts in certain actions performed with an immediate view to the honour of God; there can then be no worſhip proper for any man, which he does not believe ſuitable to that end. The obligation of ſincerely endeavouring to know God, of ſerving him, and of adoring him from the bottom of the heart, being impoſed on man by his very nature, it is impoſſible for him by his engagements with ſociety, to diſcharge this duty, or to deprive himſelf of the liberty neceſſary to fulfil it. It muſt then be concluded, that liberty of conſcience is a natural and inviolable right. It is a diſgrace to human nature, that a truth of this nature ſhould want to be proved.

§ 129. The duties and rights of the nation in regard to the public eſtabliſhment of religion.

But we ſhould take care not to extend this liberty beyond its juſt bounds. A citizen has only the right of never being obliged to do any thing in religious affairs, and not that of doing outwardly whatever he pleaſes, though it may proceed from his regard to ſociety. The eſtabliſhment of religion by the laws, and its public exerciſe, are matters of ſtate, and are neceſſary under the juriſdiction of the public authority. If all men

ought

ought to ſerve God, the entire nation, in its national capacity, is doubtleſs obliged to ſerve and honour him (Prelim. § 5.). And as it ought to diſcharge this important duty in that manner which appears to the nation to be the beſt; the nation is to determine the religion it would follow, and the public worſhip it would eſtabliſh.

§ 130. When there is no eſtabliſhed religion.

If there be yet no religion eſtabliſhed by public authority, the nation ought to uſe the utmoſt care, in order to know and eſtabliſh the beſt. That which ſhall have the approbation of the majority ſhould be received, and publicly eſtabliſhed by law; by which means it will become the religion of the ſtate. But it is aſked, if a conſiderable part of the nation inſiſts upon following another, what does the law of nations require in that reſpect? Let us firſt remember that liberty of conſcience is a natural right; and that there muſt be no conſtraint in this reſpect. There remains then two methods to take; either to permit this party of the citizens to exerciſe the religion they profeſs, or to ſeparate the ſociety, by leaving them their fortunes and their ſhare of the country that belonged to the nation in common, and thus form two new ſtates inſtead of one. The laſt method will appear no ways proper; it would weaken the nation, and thus would be contrary to the regard that ought to be felt for its ſafety. It is therefore of more advantage to take the firſt, and thus to eſtabliſh two religions in the ſtate. But if theſe religions are too incompatible; if there be reaſon to fear that they will produce diſturbances among the citizens, and diſorder in affairs; there is a third method, a wiſe medium between the two firſt, of which the Swiſs have furniſhed examples. The cantons of Glaris and Appenzel were, in the ſixteenth century, each divided into two parts, the one preſerved the Romiſh religion, and the

the other embraced the reformation; each party has its ſeparate government within itſelf; but they unite in foreign affairs, and form only one and the ſame republic, one canton.

In ſhort, if the number of citizens who would profeſs a different religion from that eſtabliſhed by the nation be inconſiderable, and if for good and juſt reaſons it is not thought proper to allow the exerciſe of ſeveral religions in the ſtate; theſe citizens have a right to ſell their land, and retire with their families; taking all their ſubſtance with them. For their engagements to ſociety, and their ſubmiſſion to the public authority can never oblige them to violate their conſciences. If the ſociety will not allow me to do what I think I am obliged to perform by an indiſpenſable obligation, it ought to diſmiſs me.

§ 131. When it is eſtabliſhed by law.

When the choice of a religion is already made, and one is eſtabliſhed by law, the nation ought to protect and maintain that religion, and preſerve it as an eſtabliſhment of the greateſt importance; but always without blindly rejecting the changes that may be propoſed to render it more pure and uſeful: for the ſtate ought always to attend to its perfection (§ 21.) But as all innovations in this caſe, are full of danger and can ſeldom be produced without diſorder, they ought not to be attempted upon ſlight grounds, without neceſſity, or very important reaſons. The ſociety, the ſtate, the entire nation is only to determine the neceſſity or convenience of theſe changes, and it does not belong to any ſingle perſon to attempt them by his own authority, nor conſequently to preach a new doctrine. Let him offer his ſentiments to the conductors of the nation, and ſubmit to the orders he receives from them.

But

But if a new religion ſpreads, and becomes fixed in the minds of the people, as it commonly happens, independently of the public authority, and without any deliberation in common; it will be then neceſſary to reaſon as we have juſt done in a former ſection, on the caſe of chuſing a religion; to pay attention to the number of thoſe who follow the new opinions; to remember that no earthly power has an authority over the conſcience, and to unite the maxims of ſound politics with thoſe of juſtice and equity.

§ 132. The duties and rights of a ſovereign with regard to religion.

This is an abridgement of the duties and rights of a nation with regard to religion. Let us now come to thoſe of the ſovereign. Theſe cannot be exactly the ſame as thoſe of the nation which the ſovereign repreſents. The nature of the ſubject oppoſes it; for in religion nobody can give up their liberty. To exhibit in a clear manner theſe duties and rights, it is neceſſary here to refer to the diſtinction we have made in the two preceding ſections: if it be required to eſtabliſh a religion in a ſtate that has not yet received one, the ſovereign may doubtleſs favour that which appears true, or the beſt to him, to make it known, and endeavour, by the moſt mild and prudent meaſures, to eſtabliſh it: he is even obliged to do this, becauſe he is obliged to ſtudy every thing that concerns the happineſs of the nation. But in this he has no right to uſe authority and conſtraint. Since there was no religion eſtabliſhed in the ſociety, when he received his authority, the people could confer no power on him in this reſpect; the maintenance of the laws relating to religion were no part of his office, and did not belong to the authority with which they intruſted him. Numa was the founder of the religion of the antient Romans: but he perſuaded the people to receive it. If he had been able to command, he would not have had recourſe to the

reveries

reveries of the nymph Egeria. Though the ſovereign cannot make uſe of authority in order to eſtabliſh a religion where there is none, he has a right, and is even obliged to employ all his power to hinder the introduction of a bad one, which he judges pernicious to morality and dangerous to the ſtate. For he ought to preſerve his people from every thing that may be injurious to them; and a new doctrine is ſo far from being an exception to this rule, that it is one of the moſt important objects. We are going to ſee in the following paragraphs, what are the duties and prerogatives of the prince in regard to the religion publicly eſtabliſhed.

§ 133. In the caſe, where there is a religion eſtabliſhed by law.

The prince or the conductor, to whom the nation has intruſted the care of the government, and the exerciſe of the ſovereign power, is obliged to watch over the preſervation of the received religion, the worſhip eſtabliſhed by law, and has a right to reſtrain thoſe who attempt to deſtroy, or diſturb it. But to acquit himſelf of his duty in a manner equally juſt and wiſe, he ought never to loſe ſight of the equality in which he is called to act, and the reaſon of his being inveſted with it. Religion is of extreme importance to the welfare and tranquillity of the ſociety, and the prince is obliged to have an eye to every thing in which the ſtate is intereſted. This is all that calls him to interfere in religion, or to protect and defend it. He can then interfere only upon this footing, and conſequently he can uſe his power againſt none but thoſe whoſe religious conduct is prejudicial or dangerous to the ſtate, and cannot puniſh pretended crimes againſt God, where the vengeance alone belongs to the Sovereign Judge, the Searcher of hearts. Let us remember that religion is no farther an affair of ſtate, than as it is exterior and publicly eſtabliſhed: that of the heart can only depend

pend on the conſcience. The prince has a right to puniſh none but thoſe that diſturb ſociety, and it would be very unjuſt for him to inflict pains and penalties on any perſon whatſoever for his private opinions, when that perſon neither takes pains to divulge them, nor to obtain followers. It is a principle of fanaticiſm, a ſource of evils, and the moſt notorious injuſtice for weak mortals to imagine that they ought to take up the cauſe of God, maintain his glory by acts of violence, and revenge him on his enemies. *Let us only give to ſovereigns*, ſaid a great ſtateſman and an excellent citizen [a], let us give them *for the common advantage, the power of puniſhing whatever is injurious to charity in ſociety. It does not belong to human juſtice to become the revenger of the cauſe that belongs to God.* Cicero who was as able, and as great in ſtate affairs, as in philoſophy and eloquence, thought like the Duke of Sully. In the laws he propoſed relating to religion, he ſays, on the ſubject of piety and interior religion, "if any one commits a fault, "God will revenge it:" but he declares the crime capital that ſhould be committed againſt the religious ceremonies eſtabliſhed for the public affairs, and in which the whole ſtate is concerned [b]. The wiſe Romans were very far from perſecuting a man for his creed; they only required that people ſhould not diſturb the public order.

§ 134. The object of his care, and the means he ought to employ.

The creed, or the opinions of the people, their ſentiments with reſpect to the Deity, in a word, interior religion ſhould, like piety, be the object of the

[a] The Duke de Sully; ſee his memoirs digeſted by M. de l'Ecluſe, *Tom.* V. *p.* 135, 136.

[b] Qui ſecus faxit, Deus ipſe vindex erit — Qui non paruerit, capitale eſto. *De Legib. Lib.* II.

prince's

prince's attention: he ſhould neglect no means of enabling his ſubjects to diſcover the truth, and to entertain good ſentiments; but he ſhould employ for this purpoſe only mild and paternal methods[a]. Here he cannot command (§ 128.). It is in external religion and its public exerciſe that his authority is to be employed. His taſk is to preſerve it, to prevent the diſorders and troubles it may occaſion. To preſerve religion he ought to maintain it in the purity of its inſtitution, to take care that it be faithfully obſerved in all its public acts and ceremonies, and to puniſh thoſe who dare attack it openly. But he can require nothing by force except ſilence, and ought never to oblige a perſon to bear a part in external ceremonies: he can only by conſtraint produce uneaſineſs or hypocriſy.

A diverſity of opinions and worſhip has often produced diſorders and fatal diſſentions in a ſtate; and for this reaſon, many will ſuffer only one and the ſame religion. A prudent and equitable ſovereign will ſee in particular conjectures, if it be proper to tolerate, or forbid the exerciſe of ſeveral different kinds of worſhip.

§ 135. Of toleration.

But in general, we may boldly affirm, that the moſt ſafe and equitable means of preventing the diſorders that may be occaſioned by difference of religions, is an univerſal toleration of all the religions that have nothing dangerous in them, either with reſpect to manners, or the ſtate. Let us ſuffer the intereſted prieſts to declaim; they would not trample under foot the laws of humanity, and thoſe of God

[a] Quas (religionis) non metu, ſed ea conjunctione, quæ eſt homini cum Deo, conſervandas puto. *Cicero de Legib. Lib.* I. What a fine leſſon does this pagan philoſopher give the Chriſtians!

himſelf,

himself, to make their doctrines triumph, if they were not the foundations on which are erected their opulence, luxury, and power. Crush only the spirit of persecution, punish severely whoever shall dare to disturb others on account of their creed, and you will see all these sects live in peace in their common country, and be ambitious of shewing themselves good citizens. Holland and the states of the King of Prussia furnish a proof of this: Calvinists, Lutherans, Socinians, Jews, Catholicks, Pietists, all live in peace, because they are equally protected by the sovereign; and none are punished but the disturbers of the tranquillity of others.

§ 136. What the prince ought to do when the nation is resolved to change the religion.

If in spite of the prince's care to preserve the established religion, the entire nation, or the greatest part of it, should be disgusted with it, and desire to have it changed: the sovereign cannot do violence to his people, nor restrain them in an affair of this nature. The public religion was established for the safety and advantage of the nation: but it is without efficacy, when it ceases to influence the heart: the sovereign has here no other authority besides that which results from the trust the nation has reposed in him; and the people have committed to him that of protecting their religion while they thought proper to profess it.

§ 137. The difference of religion ought not to make a prince lose his crown.

But at the same time it is very just that the prince should have the liberty of continuing in the profession of his own religion, without losing his crown. Provided that he protects the religion of the state, this is all that can be required of him. In general, a difference of religion should never make any prince lose the prerogatives of sovereignty, unless a fundamental law disposes it otherwise. The pagan Romans did not cease to obey Constantine, when he embraced Christianity;

anity; nor did the Chriſtians revolt from Julian, after he had quitted it.

§ 138. The agreement between the duties and rights of the ſovereign, with thoſe of the ſubjects.

We have eſtabliſhed liberty of conſcience for the people (§ 128.). However we have alſo ſhewn that the ſovereign has a right, and is even under an obligation to protect and maintain the religion of the ſtate, and not to ſuffer any perſon to attempt to alter or deſtroy it; that he may even, according to circumſtances, permit only one kind of public worſhip throughout the whole country. Let us reconcile theſe duties and various rights; between which it may be thought that there is ſome contradiction; and if poſſible leave nothing to be deſired on ſo important and delicate a ſubject.

If the ſovereign will allow only the public exerciſe of the ſame religion; let him oblige nobody to do any thing contrary to his conſcience; let no ſubject be forced to bear a part in a worſhip which he diſapproves, or profeſs a religion which he believes to be falſe; but let the ſubject on his ſide ſatisfy himſelf with his not having fallen into a ſhameful hypocriſy; let him ſerve God according to the light of his own knowledge, in ſecret and in his own houſe, perſuaded that providence does not call him to public worſhip, ſince it has placed him in ſuch circumſtances, that he cannot diſcharge it without creating diſturbances in the ſtate. God would have us obey our ſovereign, and avoid every thing that may be pernicious to ſociety. Theſe are the immutable precepts of the law of nature: that of public worſhip is conditional, and dependent on the effects it may produce. Interior worſhip is neceſſary in its own nature; and we ought to confine ourſelves to it, in all caſes in which it is moſt convenient. Public worſhip is appointed for the edification of men in glo-

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rifying God: but it oppoſes that end, and ceaſes to be laudable, on ſuch occaſions when it can only produce diſturbances and give offence. If any one believes it abſolutely neceſſary, let him leave the country where he is not allowed to perform it according to the dictates of his own conſcience, and join thoſe who openly profeſs the ſame religion as himſelf.

§ 139. The ſovereign ought to have the inſpection of the affairs of religion, and authority over thoſe who teach it.

The prodigious influence of religion on the welfare and tranquillity of the ſociety invincibly prove, that the conductor of the ſtate ought to have the inſpection of what relates to it, and an authority over the miniſters who teach it. The end of ſociety and of the civil government neceſſarily requires, that he who has the authority, ſhould be inveſted with all the rights without which he could not exerciſe it in a manner moſt advantageous to the ſtate. Theſe are the prerogatives of majeſty (§ 45.) of which no ſovereign can diveſt himſelf, without the expreſs conſent of the nation. The inſpection of the affairs of religion, and the authority over its miniſters, then form one of the moſt important of his prerogatives, ſince without this power the ſovereign would never be able to prevent the diſturbances that religion might occaſion in the ſtate, nor apply that powerful ſpring to the welfare and ſafety of the ſociety. It would be certainly very ſtrange that a multitude of men who united themſelves in ſociety for their common advantage, that each might in tranquillity labour to ſupply his neceſſities, promote his own perfection and happineſs, and live like a reaſonable being; it would be very ſtrange, I ſay, that ſuch a ſociety ſhould not have the right of being guided by its own judgment, in an affair of the utmoſt importance; of determining what is believed moſt agreeable to religion, and of taking care that nothing dangerous or hurtful is mixed with it. Who will dare to diſpute that an independent

dependent nation has a right, in this reſpect, to proceed, like others, according to the light of conſcience? and when it has once made choice of a particular religion and worſhip, may it not confer on its conductor the whole power of which it is poſſeſſed of regulating, directing and cauſing this religion and worſhip to be obſerved?

Let it not be ſaid, that ſacred things do not belong to the profane. Such diſcourſes when brought to the bar of reaſon, are found to be only vain declamations. There is nothing on earth more auguſt and ſacred than a ſovereign; and why ſhould God, who calls him by his providence to attend on the ſafety and happineſs of a whole nation, deprive him of the direction of the moſt powerful ſpring that can move mankind? The law of nature ſecures to him this right, with all thoſe that are eſſential to good government; and nothing is to be found in the Holy Scriptures that changes this diſpoſition. Among the Jews, neither the king nor any other perſon could make any innovation in the law of Moſes; but the ſovereign attended to its preſervation, and knew how to humble the high-prieſt, when he deviated from his duty. Where is it aſſerted in the New Teſtament, that a Chriſtian prince has nothing to do with religious affairs? Submiſſion and obedience to the ſuperior powers, are there clearly and expreſsly enjoined. In vain would they oppoſe againſt us the example of the apoſtles, who preached the goſpel in oppoſition to the will of ſovereigns; whoever would deviate from the ordinary rules, ought to have a divine miſſion, and to eſtabliſh his authority by miracles.

No perſon can diſpute that the ſovereign has a right to take care that people do not intrude into religion any thing contrary to the welfare and ſafety of the ſtate; and

and consequently he must have a right to examine its doctrines, and to point out what ought to be taught, and where the preacher should be silent.

§ 140. He ought to prevent the abuse of the received religion.

The sovereign ought likewise to watch attentively, in order to prevent the established religion from being abused, either by making use of its discipline to gratify hatred, avarice, or any other unworthy passions, or presenting its doctrines in a light that must prove prejudicial to the state. What advantage can society reap from crude imaginations, seraphic devotions, and sublime speculations, when it consists of only weak and docile minds? These can only produce a renunciation of the world, a neglect of business and of honest labour. This society of pretended saints will become an easy and certain prey to the first ambitious neighbour; or if it is left in peace, it will not survive the first generation; the two sexes consecrating their chastity to God, will refuse to yield to the views of the Creator of nature, and of the state. Unhappily for the missionaries, it evidently appears, even from the history of New France by Charlevoix, that their labours were the principal cause of the ruin of the Hurons. The author expressly says, that a great number of these *Neophytes*, would think of nothing but of the subjects of their faith, that they forgot their activity and valour, and divisions arose between them and the rest of the nation, &c. These people were therefore soon destroyed by the Iroquois, whom they had before been accustomed to conquer [b].

§ 141. The sovereign's authority over the ministers of religion.

To the prince's inspection of the affairs and offices of religion we have joined his authority over its ministers; both of them flow from the same principle; for with-

[b] See *The History of New France*, Book V. VI. and VII.

our

out this laſt, the firſt would be vain and uſeleſs. It is abſurd, and contrary to the firſt foundations of ſociety, for citizens to pretend to be independent of the ſovereign authority, in offices of ſuch importance to the repoſe, the happineſs and ſafety of the ſtate. This is eſtabliſhing two independent powers in the ſame ſociety: a certain principle of diviſion, diſturbance and ruin. There is only one ſupreme power in the ſtate; the offices of the ſubalterns vary according to their employments: the eccleſiaſtics, magiſtrates, and commanders of the troops, are all officers of the republic, each in his department; and all are equally accountable to the ſovereign.

§ 142. The nature of this authority.

A prince cannot indeed juſtly oblige an eccleſiaſtic to preach a doctrine, or to perform a religious rite which he does not believe to be agreeable to the will of God. But if the miniſter cannot, in this reſpect, conform to the will of his ſovereign, he ought to quit his place, and conſider himſelf as a man who is not called to fill it; two things being neceſſary for the diſcharge of his duty, to teach and behave with ſincerity, according to the dictates of his own conſcience, and to conform to the prince's intentions, and the laws of the ſtate. Who can forbear being filled with indignation, at ſeeing a biſhop audaciouſly reſiſt the orders of the ſovereign, and the decrees of the ſupreme tribunals, ſolemnly declaring that he believes himſelf accountable to God alone, for the power with which he has intruſted him?

§ 143. The rules to be obſerved with reſpect to eccleſiaſtics.

On the other hand, if the clergy are humbled, it will be out of their power to produce the fruits for which their miniſtry was appointed. The rule that ſhould be followed in this reſpect may be conceived in a few words. Firſt, the clergy, as well as every other order, ſhould ſubmit in their functions, and in every thing elſe,

to the public power, and be accountable for their conduct to the ſovereign. Secondly, the prince ſhould take care to render the miniſters of religion reſpectable in the eyes of the people: he ſhould truſt them with the degree of authority neceſſary to enable them to diſcharge their duty with ſucceſs, and ſupport them, in caſe of need, with the power he holds in his own hands. Every man in place ought to be furniſhed with an authority anſwerable to his functions; otherwiſe he will be unable to diſcharge them in a proper manner. I ſee no reaſon why the clergy ſhould be excepted from this general rule, only the prince ſhould be more particularly watchful that they do not abuſe his authority; the affair being altogether the moſt delicate, and the moſt fruitful in dangers. As he ſhould render the character of churchmen reſpectable, he ſhould take care that this reſpect is not carried to ſuch a ſuperſtitious veneration as to put it in the power of an ambitious prieſt, to have what influence he pleaſes over weak minds. As ſoon as the clergy are made a ſeparate body, they become formidable. The Romans, (whom we often cite) the wiſe Romans received into the ſenate the pontifex-maximus, and the principal miniſters of the altar: they were ignorant of the diſtinction between the *clergy* and *laity*; and all citizens wore the ſame robe.

§ 144. A recapitulation of the reaſons on which are eſtabliſhed the rights of ſovereigns in matters of religion; with authorities and examples.

If the ſovereign be deprived of this power in matters of religion, and this authority over the clergy, how will he prevent there being any thing mixed with religion that is contrary to the welfare of the ſtate? How will he be enabled to take ſuch meaſures, as to cauſe it to be conſtantly taught and practiſed in the manner moſt conducive to the public welfare? And eſpecially, how will he prevent the diſorders that may be occaſioned, either by doctrines, or the manner in which the diſcipline is exerted? Theſe cares and duties can only belong

to

to a ſovereign, and nothing can diſpenſe with his diſcharging them.

Hence we ſee that the prerogatives of the crown, in eccleſiaſtical affairs, have been conſtantly and faithfully defended by the parliaments of France. The wiſe and learned magiſtrates of which thoſe illuſtrious bodies are compoſed, are ſenſible of the maxims which ſound reaſon dictates on this ſubject. They know the conſequence of not ſuffering any abridgement to be made of the public authority in an affair in its own nature ſo delicate, ſo extenſive in its connections, and influences, and ſo important in its conſequences. What ſhall eccleſiaſtics reſolve to propoſe to the people as articles of faith, ſome obſcure and uſeleſs points, that is no eſſential part of the received religion; ſhall they ſeparate from the church, and defame thoſe who do not ſhew a blind obedience; ſhall they refuſe them the ſacraments, and even the rights of burial; and ſhall not the prince protect his ſubjects, and preſerve the kingdom from a dangerous ſchiſm?

The kings of England have aſſerted the prerogatives of their crown; they have cauſed themſelves to be acknowledged heads of the church, and this regulation is equally approved by reaſon and ſound politics, and is alſo conformable to ancient cuſtom. The firſt Chriſtian emperors exerciſed all the functions of heads of the church; they made laws on ſubjects relating to it [a], ſummoned councils, and preſided at them; elected and depoſed biſhops, &c. In Switzerland there are wiſe republics, whoſe ſovereigns, knowing the full extent of the ſupreme authority, have rendered the miniſters of religion ſubject to them, without offering violence to conſcience. They have prepared a formulary of the

[a] See the *Theodoſian Code.*

doctrines that ought to be preached, and publiſhed ſuch laws of eccleſiaſtical diſcipline, as they would have exerciſed in the countries under their obedience; in order that thoſe who would not conform to theſe eſtabliſhments, might not devote themſelves to the ſervice of the church. They keep all the miniſters of religion under a lawful dependence; and diſcipline is exerted under their own authority. It is not probable that religion will ever occaſion diſturbances in theſe republics.

§ 145. Pernicious conſequences of the contrary opinion.

If Conſtantine and his ſucceſſors had expreſsly declared themſelves the heads of the church, and if the Chriſtian kings and princes had, in this inſtance, known how to maintain the rights of ſovereignty; would there ever have appeared thoſe horrid diſorders produced by the pride and ambition of ſome popes and eccleſiaſtics, emboldened by the weakneſs of princes, and ſupported by the ſuperſtition of the people. What rivers of blood have been ſhed in the quarrels of monks, about ſpeculative queſtions that were often unintelligible, and almoſt always as uſeleſs with reſpect to the ſalvation of ſouls, as they were indifferent in themſelves, or in regard to the welfare of ſociety: citizens and even brothers have taken up arms againſt each other: ſubjects have been excited to revolt, and kings tumbled from their thrones: *tantum religio potuit ſuadere malorum!* The hiſtory of the emperors Henry IV. Frederic I. Frederic II. and Louis of Bavaria, are well known. Was it not the independence of the eccleſiaſtics, and of that ſyſtem in which the affairs of religion are ſubmitted to a foreign power, that plunged France into the horrors of the league, and had nearly deprived her of the beſt and greateſt of her kings? Had it not been for this ſtrange and dangerous ſyſtem, would a ſtranger, Pope Sixtus V. have undertaken to violate the fundamental law of a kingdom, to declare the lawful

lawful heir incapable of wearing the crown? Would, at other times, and in other places [b], the ſucceſſion have been rendered uncertain, from the want of a formality in a diſpenſation whoſe validity was diſputed, and which a foreign prelate pretended to have a ſole right to give? Would that ſame foreigner have arrogated to himſelf the power of pronouncing that the children of a king were illegitimate? Would kings have been aſſaſſinated in conſequence of a deteſtable doctrine [c]? Would a part of France not dare to acknowledge the beſt of their kings [d], before they had been abſolved by Rome? And would many other princes have been unable to give a ſolid peace to their people, from their being unable in their own dominions, to decide affairs that belonged to religion [e]?

§ 146. The abuſes particulariſed. 1. The power of the popes.

All we have advanced on this ſubject ſo evidently flows from the notions of independence and ſovereignty, that it will never be diſputed by an honeſt man who endeavours to reaſon juſtly. If a ſtate cannot finally determine every thing relating to religion, the nation is not free, and the prince is but half a ſovereign. There is no medium in this caſe; either each ſtate is its own maſter in this reſpect, as well as in all others, or it muſt receive the ſyſtem of Boniface VIII. and conſider all popiſh countries as forming one only ſtate, of which the pope is the ſupreme head, and the kings ſubordinate adminiſtrators in temporal affairs, each in his province; nearly as the ſultans were formerly under the authority of the kaliſs. We know that this pope pre-

[b] In England, under Henry VIII.

[c] Henry III. and Henry IV. aſſaſſinated by the fanatics, who thought to ſerve God and the church by ſtabbing their king.

[d] Though Henry IV. embraced the Romiſh religion, a great number of Catholics did not dare to acknowledge him before he had received the Pope's abſolution.

[e] Many kings of France in the religious wars.

ſumed

ſumed to write to Philip the Fair, king of France, *Scire te volumus, quod in ſpiritualibus & temporalibus nobis ſubes*[f]: Know that thou art ſubject to us as well in temporals as in ſpirituals. And we may ſee in the canon law[g] the famous bull *unam ſanctam*, in which is attributed to the church two ſwords, or a double power, ſpiritual and temporal, and thoſe who think otherwiſe are condemned as men, who after the example of the Manicheans, eſtabliſh two principles, and it is at length declared, that *it is an article of faith, neceſſary to ſalvation, to believe that every human creature is ſubject to the Pontiff of Rome.*

We reckon the enormous power of the popes, as the firſt abuſe that ſprung from this ſyſtem, which diveſts ſovereigns of their authority in matters of religion. This power in a foreign court, is abſolutely contrary to the independence of nations and the ſovereignty of princes. It is capable of overturning the ſtate, and wherever acknowledged, it is impoſſible for the ſovereign to govern in ſuch a manner as is moſt for the advantage of the nation. We have already, in the laſt ſection, given ſeveral remarkable inſtances of this, and hiſtory preſents them without number. The ſenate of Sweden having condemned Trollius, archbiſhop of Upſal, for the crime of rebellion, to be degraded from his ſee, and to end his days in a monaſtery, pope Leo X. had the audacity to excommunicate the adminiſtrator Steno, and the whole ſenate, and ſentenced them to rebuild at their own expence, a fortreſs belonging to the archbiſhop, which they had cauſed to be demoliſhed, and to pay a fine of a hundred thouſand du-

[f] *Turretin. Hiſt. Eccleſiaſt. Compendium*, p. 182. Where may alſo be ſeen the king of France's bold anſwer.

[g] *Extravag. Commun. Lib. I. Tit. De Majoritate & obedientia.*

cats

eats to the depoſed prelate [b]. The barbarous Chriſtiern, king of Denmark, was authoriſed by this decree to lay Sweden waſte, and to ſpill the blood of the moſt illuſtrious of the nobility. Paul V. thundered out an edict againſt Venice, on account of ſome very wiſe laws made with reſpect to the government of the city; but which diſpleaſed the Pope, and threw the republic into an embarraſſment from which all the wiſdom and firmneſs of the ſenate could ſcarcely deliver them. Pius V. in his bull *in Cœna Domini* of the year 1567, declares, that all princes who ſhall introduce new taxes in their dominions, of what nature ſoever they be, or ſhall increaſe the ancient ones, without having firſt obtained the approbation of the holy ſee, are excommunicated *ipſo facto*. Is not this attacking the independence of nations, and ruining the authority of ſovereigns?

In thoſe unhappy times, the dark ages that preceded the revival of literature and the reformation, the popes attempted to regulate the actions of princes, under the pretence of conſcience, to judge of the validity of their treaties, to break their alliances, and declare them null and void. But theſe enterpriſes met with a vigorous reſiſtance, even in a country where it is commonly imagined there was then much valour and very little knowledge. The pope's nuncio, to oblige the Swiſs to forſake the French, publiſhed a monitory againſt all thoſe cantons who favoured Charles VIII. declaring them excommunicated, if within the ſpace of fifteen days they did not forſake the intereſt of that prince, and enter into the confederacy againſt him: but the Swiſs oppoſed this act by a proteſtation that declared it abuſive, and cauſed it to be pulled down in all the places under their obedience; thus they ſhewed their contempt for a proceeding that was

[b] *Hiſtory of the Revolutions of Sweden.*

equally

equally abſurd and contrary to the rights of ſovereigns[i]. We ſhall mention ſeveral other of the like attempts when we come to treat of the faith of treaties.

§ 147. 2. Important employments conferred by a foreign power.

This power in the popes has given birth to another abuſe, that deſerves the utmoſt attention from a wiſe government. We ſee ſeveral countries in which eccleſiaſtical dignities, and great benefices are diſtributed by a foreign power, by the pope, who beſtows them upon his creatures, and very often on men who are not the ſubjects of the ſtate. This practice is equally contrary to the law of nations, and the principles of common policy. A people ought not to receive laws from ſtrangers, to ſuffer them to interfere in their affairs, nor to take from them their advantages: but how many ſtates are there where a ſtranger may diſpoſe of places of very great importance with reſpect to their happineſs and repoſe? The princes who conſented to the introduction of ſo enormous an abuſe, were equally wanting to themſelves and their people. In our times the court of Spain has been obliged to expend immenſe ſums to enter without danger into the peaceable poſſeſſion of a right, that eſſentially belongs to the nation, or its head.

§ 148. 3. Powerful ſubjects dependent on a foreign court.

Even in the ſtates whoſe ſovereigns have preſerved ſo important a prerogative of the crown, the abuſe in a great meaſure ſubſiſts. The ſovereign nominates indeed to biſhoprics and great benefices; but his authority is not ſufficient to put them in the poſſeſſion of their benefices, and to enable them to enter into the exerciſe of their functions, they muſt alſo have bul's from Rome[k]. By this

[i] *Vogel's Hiſtorical and Political Treatiſe on the Alliances between France and the thirteen Cantons*, p. 33, *and* 36.

[k] We may ſee in the letters of Cardinal d'Oſſat, what pains, what oppreſſions, what long delays Henry IV. ſuffered, when he reſolved to promote Renald de Baune, Archbiſhop of Bourges, to the archbiſhopric of Sens, though that prelate had ſaved France, by receiving the king into the Roman church.

means,

means, and by a thouſand others, the whole body of the clergy ſtill depend on the court of Rome: they expect from it dignities and the purple, which, according to the oſtentatious pretenſions of thoſe who are inveſted with it, renders them equal to ſovereigns: they have every thing to fear from its reſentment, and therefore are always diſpoſed to comply with it. On the other hand, the court of Rome ſupports this clergy with all its power; it aſſiſts them by its politics and credit; protects them againſt their enemies, and againſt thoſe who would ſet bounds to their power; frequently againſt the juſt indignation of their ſovereign; and by this means attaches them to it ſtill more ſtrongly. Is it not doing an injury to the rights of ſociety, and ſhocking the firſt elements of government, thus to ſuffer a great number of ſubjects, and even ſubjects in high poſts, to be dependent on a foreign prince, and become devoted to him? Would a prudent ſovereign receive men who preached ſuch doctrines? There needed no more to cauſe all the miſſionaries to be driven from China.

§ 149. 4. The celibacy of the prieſts. Convents.

The better to ſecure the devotion of the clergy, the celibacy of church-men was invented. A prieſt, a prelate, already bound to the ſee of Rome by his functions and his hopes, finds himſelf alſo cut off from all connection with his country, by the celibacy he is obliged to obſerve. He is not connected to the ſociety by a family: his grand intereſts are all centred in the church; and provided he has the pope's favour, he is afraid of nothing: in what country ſoever he is born, Rome is his refuge, the centre of his adopted country. Every body knows that the religious orders are, like a papal militia, ſpread over the face of the earth, to ſupport and advance the intereſt

tereſt of their monarch. This is doubtleſs a ſtrange abuſe, ſubverſive of the firſt laws of ſociety. But this is not all: if the prelates were married, they might enrich the ſtate with a great number of good citizens; rich benefices affording them the means of giving their legitimate children a ſuitable education. But what a multitude of men are there in convents, conſecrated to idleneſs under the cloak of devotion! Equally uſeleſs to ſociety in peace and war, they ſerve it neither by their labour in neceſſary profeſſions, nor by their courage in arms; and yet enjoy immenſe revenues: for this purpoſe the ſweat of the people furniſhes ſupport for theſe ſwarms of ſluggards. What ſhould we think of a queen of bees who protected uſeleſs hornets to devour the honey of her ſubjects[l]? It is not the fault of theſe fanatic preachers of overſtrained ſanctity, if all their devotees do not imitate the celibacy of the monks. How have princes been able to bear their publickly extolling, as the moſt ſublime virtue, a practice equally contrary to nature, and pernicious to ſociety? Among the Romans, laws were made to diminiſh the number of bachelors and to favour marriage[m]: but ſuperſtition made no delay in attacking ſuch juſt and wiſe regulations; and the Chriſtian emperors, perſuaded by churchmen, thought themſelves obliged to abrogate them[n]. Several of the fathers of the church have cenſured theſe laws of Auguſtus; *doubtleſs*, ſays a great man[o], *with a laudable zeal for the things of another life; but with very little knowledge of the affairs of this.* This great man

[l] This reflection has no relation to the religious houſes in which literature is cultivated. Eſtabliſhments that afford a peaceful retreat to the learned, with all the leiſure and tranquillity required in the ſtudy of the moſt profound ſciences, are always laudable, and may be rendered very uſeful to the ſtate.

[m] The law of Papea-Poppæa.

[n] In the Theodoſian Code.

[o] The preſident de Monteſquieu, in his Spirit of Laws.

lived

lived in the Roman church; he did not dare to say plainly that voluntary celibacy is to be condemned with respect to conscience and the things of another life: but the conduct, most certainly worthy of a true piety, is to conform ourselves to nature, to fulfil the views of the Creator, and to labour for the welfare of society. If a person is capable of raising a family; if he marries; if he takes care to give his children a good education, he does his duty, and is really in the way of salvation.

§ 150. 5. Enormous pretensions of the clergy. Pre-eminence.

The enormous and dangerous pretensions of the clergy, are also another consequence of this system that deprives the civil power of every thing relating to religion. In the first place, the ecclesiastics, under the pretence of the holiness of their function, have raised themselves above all the other citizens, even the principal magistrates; and against the express orders of their Master, who said to his apostles, *seek not the first places at feasts*, they have almost every where arrogated to themselves the first rank. Their head in the Roman church, causes sovereigns to kiss his feet; emperors have held the bridle of his horse: and if bishops, or even mere priests, do not at present raise themselves above their prince, it is because the times will not permit it: they have not always been so modest, and one of their writers has presumed to say, that a *priest is as much above a king, as a man is above a beast* [p]. How many authors better known and more esteemed than this, have been pleased to revive and extol the foolish speech attributed to the emperor Theodosius I. *Ambrose has learnt me the great distance there is between the empire and the priesthood.*

[p] Tantum sacerdos præstat regi, quantum homo bestiæ: *Stanislaus Oriechovius. Vide Tribbechov. Exerc. 1. ad Varon. Annal. Sect. 2. & Thomas. Not. ad Lancell.*

We

We have already obſerved that eccleſiaſtics ought to be honoured: but modeſty, and even humility is proper to them. Does it then become them to forget it themſelves, while they preach it to others? I ſhould not mention a vain ceremonial, was it not attended with very important conſequences, from the pride with which it inſpires many of the prieſts, and the impreſſions it makes on the minds of the people. It is eſſentially neceſſary to good order, that ſubjects ſhould behold none in ſociety ſo worthy of reſpect as their ſovereign, and next to him, thoſe on whom he has devolved a part of his authority.

§ 151. 6. Independence, immunities.

Eccleſiaſtics have not ſtopped in ſo fair a path. Not contented with rendering themſelves independent, with reſpect to their functions, aided by the court of Rome, they have even attempted to withdraw themſelves entirely, and in all reſpects from the political authority. There have been times when an eccleſiaſtic could not be brought before a ſecular tribunal for any crime whatſoever. The canon law declares expreſsly *It is indecent for laymen to judge a churchman* [q]. The popes Paul III. Pius V. and Urban VIII. by their bulls *in cæna Domini*, excommunicated the lay judges who preſumed to attempt the bringing eccleſiaſtics to their trial. Even the biſhops of France have not been afraid to ſay on ſeveral occaſions, *that they did not depend on any temporal power*; and theſe are the terms which the general aſſembly of the French clergy dared to uſe in the year 1656, *The decree of council having been read, was diſapproved by the aſſembly, becauſe it leaves the king judge of the biſhops, and ſeems to ſubmit their immuni-*

[q] Indecorum eſt laïcos homines viros eccleſiaſticos judicare. *Can. in nona auctione* 22. XVI. q. 7.

ties

ties to his judges [r]. There are decrees of the popes that excommunicate whoever impriſons a biſhop. According to the principles of the church of Rome, a prince has not the power of puniſhing an eccleſiaſtic with death, though a rebel, or malefactor; it is neceſſary for him to apply to the eccleſiaſtical power, and the latter, if it pleaſes, is to deliver him up to the ſecular arm, after having degraded him. Hiſtory affords us a thouſand examples of biſhops, that have remained unpuniſhed, or been but ſlightly chaſtiſed for crimes which coſt the lives of the greateſt lords. John de Braganza, king of Portugal, cauſed thoſe lords who had conſpired his deſtruction to be juſtly puniſhed; but he did not dare to put to death the archbiſhop of Braga, the author of that deteſtable plot [s].

A whole, numerous, and powerful order, withdrawn from the public authority, and rendered dependent on a foreign court, is an entire ſubverſion of order in the republic, and a manifeſt diminution of the ſovereignty. This is a mortal ſtab given to ſociety in its very eſſence, that every citizen ſhould ſubmit to the public authority. Indeed the community which the clergy, in this reſpect, arrogate to themſelves is ſo contrary to the natural and neceſſary rights of a nation, that the king himſelf has not the power of granting it. But the eccleſiaſtics tell us, they derive this power from God himſelf: but till they have furniſhed any proof of their pretenſions, let us adhere to this certain principle, that God deſires the ſafety of ſtates, and not what introduces into them diſorder and deſtruction.

§ 152. Immunity of the riches of the church.

The ſame immunity is pretended with reſpect to the riches of the church. The ſtate might, without doubt, exempt this wealth from all expences, when it was

[r] See *the tranſlation of the facts on the ſyſtem of the independance of biſhops.*
[s] Revolution of Portugal.

ſcarcely

ſcarcely ſufficient for the ſupport of the eccleſiaſtics: but they ought to hold this favour only from the public authority, which has always a right to revoke it, whenever the welfare of the ſtate makes it neceſſary. One of the fundamental and eſſential laws of all ſociety being, that in caſe of neceſſity, the wealth of all the members ought to contribute proportionably to the common neceſſities; the prince himſelf cannot of his own authority, grant an entire exemption to a very numerous and rich body, without being guilty of extreme injuſtice to the reſt of his ſubjects, on whom, by this exemption, the burden will entirely fall.

The goods of the church are ſo far from having an exemption on account of their belonging to God, that, on the contrary, it is for this very reaſon that they ought to be taken the firſt to procure the ſafety of the ſtate. For nothing is more agreeable to the common Father of mankind than our ſaving a ſtate from ruin. God himſelf having no need of any thing, the conſecration of wealth to him is appropriating it to ſuch uſes as are agreeable to his nature. Beſides a great part of the revenues of the church, by the confeſſion of the clergy themſelves, is appointed for the poor. When the ſtate is in neceſſity it is doubtleſs the firſt and principal poor, and the moſt worthy of aſſiſtance. If we underſtood this in the moſt ordinary caſe, we muſt ſay, that applying a part of the current revenue of the church towards eaſing the people, is really giving it to the poor, according to its appointment. But it is really contrary to religion and the intentions of the founders to apply to pomp and luxury, revenues that ought to be conſecrated to the relief of the poor and miſerable [t].

[t] See *Letters on the Pretenſions of the Clergy.*

It

§ 153. Excommunication of men in high poſts.

It was however thought too little for the Romiſh eccleſiaſtics to render themſelves independent: they undertook to bring mankind under their dominion; and indeed they had reaſon to deſpiſe the ſtupid mortals who ſuffered them to do it. Excommunication was formidable arms in the hands of ignorant and ſuperſtious men, who neither knew how to reduce it to juſt bounds, nor to diſtinguiſh its uſe. Hence have ariſen diſorders even in ſome proteſtant countries. Popiſh eccleſiaſtics have preſumed, by their mere authority, to excommunicate men in high employments, magiſtrates of uſe to the ſociety, and have pretended that theſe officers of ſtate being ſtruck with the thunder of the church, could no longer diſcharge the duty of their poſts. What a perverſion of order and reaſon! What! ſhall not a nation be allowed to truſt its affairs, its happineſs, its repoſe and ſafety, in ſuch hands as appear the moſt able and the moſt worthy of this truſt? Shall a foreign power deprive the ſtate, whenever it pleaſes, of its moſt wiſe conductors, of its firmeſt ſupports; and the prince of his moſt faithful ſubjects! So abſurd a pretenſion has been condemned by princes, and even by ſome judicious and reſpectable prelates. We read in the 171ſt letter of Ives de Chartres, archbiſhop of Sens, that the royal capitularies, conformably to the third canon of the twelfth council of Trent, held in the year 681, enjoined the prieſts to receive to their converſation, thoſe whom the royal majeſty had received into favour, or to his table, though they had been excommunicated by them, or by others, in order that the church might not appear to reject or condemn thoſe whom the king was pleaſed to employ in his ſervice [w].

[w] See the ſame Letters.

The

§ 154. And of sovereigns themselves

The excommunications againſt the ſovereigns themſelves, accompanied with the abſolutions of their ſubjects from their oaths of obedience, put the finiſhing ſtroke to this enormous abuſe; and it is almoſt incredible that nations ſhould ſuffer ſuch odious attempts. We have juſt touched on this in §§ 145. and 146. The thirteenth century gives ſtriking inſtances of it. Otho V. for endeavouring to oblige ſeveral provinces of Italy to ſubmit to the laws of the empire, was excommunicated, deprived of the empire by Innocent III. and his ſubjects freed from their oath of allegiance. In ſhort, this unfortunate emperor was abandoned by the princes, and obliged to reſign the crown to Frederic II. John, king of England, reſolving to maintain the rights of his kingdom, in the election of an archbiſhop of Canterbury, found himſelf expoſed to the audacious enterpriſes of the ſame pope. Innocent excommunicated the king; laid the whole kingdom under an interdict; declared John unworthy of the throne, and freed his ſubjects from their oath of fidelity; he inſtigated againſt him his own clergy, who excited his ſubjects to rebel; he perſuaded the king of France to take up arms in order to dethrone him, publiſhing at the ſame time a cruſade againſt him, as he might have done againſt the Saracens. The king of England at firſt appeared reſolved vigorouſly to defend himſelf; but ſoon loſing his courage, ſuffered himſelf to be brought to ſuch exceſs of infamy, as to reſign his kingdoms into the hands of the pope's legate, to receive them back from him, and to hold them as a fief of the church, on the condition of paying tribute [x].

[x] Matthew Paris; *Turretin. Compend. Hiſt. Eccleſ. Secul.* XIII.

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The popes were not the only perſons guilty of thoſe attempts: there have been councils who have borne a part in them. That of Lyons, ſummoned by Innocent IV. in the year 1245, had the audacity to cite the emperor Frederic II. to appear before that body in order to purge himſelf from the accuſations laid againſt him, threatening him with the thunders of the church if he failed to do it. That great prince did not give himſelf much pain about ſo irregular a proceeding. He ſaid, "That the pope re-"ſolved to make himſelf both a judge and a ſovereign; "but that from all antiquity the emperors themſelves had "called councils, where the popes and prelates rendered "to them, as to their ſovereigns, the reſpect and obedience "that was their due [a]. However, the emperor giving a little into the ſuperſtition of the times, condeſcended to ſend his ambaſſadors to the council, to defend his cauſe, which did not prevent the pope from excommunicating him, and declaring him deprived of the crown. Frederic, like a man of ſuperior genius, laughed at theſe vain fulminations, and behaved in ſuch a manner, that he preſerved the crown in ſpite of the election of Henry, Landgrave of Thuringia, whom the eccleſiaſtical electors and many biſhops, preſumed to declare king of the Romans; but by that election he obtained nothing more than the ridiculous title of *king of the prieſts*.

I ſhould never have done, were I to accumulate examples. To the diſhonour of humanity, there are too many of them. The ſight of that exceſs of folly to which ſuperſtition reduced the nations of Europe in theſe unhappy times, affords very humbling reflections.

§ 155. 10. The clergy drawing every thing to them, and diſturbing the order of juſtice.

By the ſame ſpiritual arms the clergy drew every thing to themſelves, uſurped the authority of the tribunals, and diſturbed the courſe of juſtice. They pretended to take cognizance of all cauſes, *on account of ſin, the cognizance of which there is no perſon of good ſenſe who does not know,*

[a] *Heiſs's Hiſtory of the Empire, Book* II. *Chap.* XVI.

ſays pope Innocent III. [b] *belongs to our miniſtry*. In the year 1329, the prelates of France dared to tell king Philip de Valois, that hindering them from bringing all cauſes before the eccleſiaſtical courts, was depriving the church of all its rights, *omnia eccleſiarum jura tollere* [c]. Thus they would decide all diſputes. They boldly oppoſed the civil authority, and made themſelves feared by proceeding in the way of excommunication. It even happened that the dioceſes being not always confined to the extent of the political territories, a biſhop would cite ſtrangers before his court for cauſes merely civil, and attempted to determine them by a manifeſt violation of the law of nations. The diſorders of theſe kinds were carried ſo far for three or four centuries, that our wiſe anceſtors thought themſelves obliged to take ſerious meaſures to put a ſtop to it; and ſtipulated in their treaties, that *none* of the confederates *ſhould be ſummoned before ſpiritual courts, for debts relating to money, ſince every one ought to be contented with the juſtice of the place* [d]. We find in hiſtory that the Swiſs on many occaſions ſuppreſſed the encroachments of the biſhops and their officers.

Over every affair of life they extended their authority, under the pretence that conſcience was concerned; they made the new-married huſbands purchaſe the permiſſion of lying with their wives, the three firſt nights after marriage [e].

§ 156. 11. Money drawn to Rome.

This burleſque invention leads us to another abuſe, manifeſtly contrary to the rules of a wiſe policy, and to what a nation owes to itſelf. I would mention here the immenſe ſums, which bulls, diſpenſations, &c. drew annually to the court of Rome, from all the countries under its communion. How much might be ſaid on the ſcandalous trade of indulgences? but it at laſt became ruinous to

[b] *In cap. novit de judiciis.*

[c] See Leibnitii Codex *juris cent. diplomat.* Dipl. LXVII. § 9

[d] *Ibid.* Alliance of Zurich with the cantons of Uri, Schweitz, and Underwald, dated May 1, 1351. § 7.

[e] See *A Regulation of Parliament in an arret of March 19, 1409* *Spirit of Laws.* This was exactly, ſays M. de Monteſquieu, the very night they ought to have choſen; they would not have drawn great ſums of money from the others.

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the court of Rome: for by endeavouring to gain too much, they ſuffered irreparable loſſes.

§ 157. 19. Laws and cuſtoms contrary to the welfare of ſtates.

At length, this independent authority truſted to eccleſiaſtics, who were often too little capable of knowing the true maxims of government, or too careleſs of being informed about them, and were beſides wholly given up to fanatical viſions, empty ſpeculations, and notions of a chimerical and ridiculous purity: this authority, I ſay, produced under the pretence of ſanctity, laws and cuſtoms that were pernicious to the ſtate. We have touched upon ſome of theſe. Grotius mentions a very remarkable example of them. "In the ancient Greek church, ſays, he, was "long obſerved a canon, by which thoſe who had killed an "enemy in any war whatſoever, were excommunicated for "three years [e]." A fine reward beſtowed on the heroes who defended their country, and granted inſtead of the crowns and triumphs with which pagan Rome had honoured them. Pagan Rome becoming miſtreſs of the world, adorned her braveſt warriors with crowns: but the empire becoming Chriſtian, ſoon became a prey to barbarians: her ſubjects by defending her, obtained the penalty of excommunication: while by leading an idle life, they thought themſelves in the road to heaven, and actually found themſelves in that of grandeur and riches.

CHAP. XIII.

Of Juſtice and Polity.

§ 158. A nation ought to make juſtice reign.

NEXT to the care of religion, one of the principal duties of a nation relates to juſtice. It ought to take the utmoſt care to make this virtue reign in the ſtate; and to take proper meaſures that it be rendered to every

[e] *De Jure Belli & Pacis, Lib.* II. *Amphiloch* X. 13. *Zonar. in Niceb.* Cap. XXIV. He quotes *Baſil. ad Phac. Vol.* III.

one, in the ſafeſt, the moſt ſpeedy, and the leaſt burdenſome manner. This obligation flows from the end, and the very contract of civil ſociety. We have ſeen (§ 15.) that men have bound themſelves by the engagements of ſociety, and conſented to ſtrip themſelves, in its favour, of a part of their natural liberty, only with a view of enjoying what belongs to them in tranquillity, and of obtaining juſtice with ſafety. The nation would then be wanting to itſelf, and deceive the individuals, if it did not ſeriouſly apply to make the ſtricteſt juſtice flouriſh. This attention it owes to its own happineſs, repoſe, and proſperity. Confuſion, diſorder, and diſcouragements will ſoon ariſe in a ſtate, when the citizens are not ſecure of eaſily obtaining ſpeedy juſtice, with reſpect to all their differences; without this, the civil virtues will become extinguiſhed, and the ſociety weakened.

§ 159. To eſtabliſh good laws.

There are two methods of making juſtice flouriſh; good laws, and the attention of the ſuperiors to ſee them executed. In treating of the conſtitution of a ſtate (Chap. III.) we have already ſhewn, that a nation ought to eſtabliſh juſt and wiſe laws, and have alſo pointed out the reaſons, why we cannot here enter into the particulars of thoſe laws. If men were always equally wiſe, juſt, and equitable, the law of nature would doubtleſs be ſufficient for ſociety. But ignorance, the illuſions of ſelf-love, and the violence of the paſſions, too often render theſe ſacred laws ineffectual. Thus we ſee that all well-governed nations have perceived the neceſſity of poſitive laws. There is a neceſſity for general rules and forms that each may clearly know his own claims without being miſled by ſelf-deception; it is neceſſary ſometimes to deviate from natural equity, in order to prevent frauds and abuſe, and to accommodate ourſelves to circumſtances; and ſince the ſenſation of duty has frequently ſo little influence on the heart of man, it is neceſſary that the penal ſanctions of the law ſhould add all their efficacy. Thus is the law of nature converted into a civil law.

law [f]. It would be dangerous to commit the intereſts of the citizens to the mere arbitrary will of thoſe who ought to diſtribute juſtice. The legiſlature ſhould aſſiſt the underſtanding of the judges, force their prejudices and inclinations, and ſubject their will to ſimple, fixed and certain rules. This is the civil law.

§ 160. To make them obſerved.

The beſt laws are uſeleſs, if they are not obſerved. The nation ought then to take pains to maintain them, and to cauſe them to be punctually executed: no meaſures can be taken in this reſpect too juſt, too extenſive, and too effectual; for on this, in a great meaſure, depends its happineſs, glory and tranquillity.

§ 161. The functions and duties of the prince in this reſpect.

We have already obſerved, (§ 41.) that the ſovereign who repreſents a nation, and is inveſted with its authority, is alſo entruſted with its duties. The care of diſtributing juſtice muſt then be one of the principal functions of the prince, and nothing can be more worthy of the majeſty of the ſovereign. The emperor Juſtinian thus begins the book of his Inſtitutes: *Imperatoriam majeſtatem non ſolùm armis decoratam, ſed etiam legibus oportet eſſe armatam: ut utrumque tempus, & bellorum, & pacis, rectè poſſit gubernari.* The degree of power truſted by the nation to the head of the ſtate, is then the rule of his duties and his functions in the adminiſtration of juſtice. So that the nation may either reſerve the legiſlative power to itſelf, or truſt it to a ſelect body; it has alſo a right, if it thinks proper, to eſtabliſh a ſupreme tribunal to judge of all diſputes independently of the prince. But the conductor of the ſtate muſt naturally have a conſiderable ſhare in the legiſlature, and it may be even entruſted entirely to him. In this laſt caſe, it will be his duty to eſtabliſh ſalutary laws, dictated by wiſdom and equity: but in all caſes, he ſhould be the guardian of the laws; he ſhould watch over thoſe that are to be put in force, and confine his people within the bounds of duty.

[f] See a diſſertation on this ſubject, in *Philoſophical Leiſure*, page 71. and following.

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§ 162. How he ought to distribute justice.

The executive power naturally belongs to the sovereign, and to every conductor of a people: he is even supposed to be invested with it, in its full extent; when the fundamental laws do not restrain him. When the laws are established, the prince is to cause them to be executed; to maintain them with vigour, and to make a just application of them to all cases that present themselves, which is called rendering justice. This is the duty of the sovereign, who is naturally the judge of his people. We have seen the chiefs of some small states perform these functions themselves: but this custom becomes inconvenient, and even impossible in great kingdoms.

§ 163. He ought to establish judges of knowledge and integrity.

The best and safest method of distributing justice is by establishing judges, distinguished by their integrity and knowledge, to decide all the disputes that may arise between the citizens. It is impossible for the prince to take upon himself this painful task; he has neither the time necessary to search into the bottom of all causes, nor to obtain the knowledge necessary to decide them. As the sovereign cannot in person discharge all the functions of government, he should reserve to himself, with a just discernment, those he may fulfil with success, and that are of most importance, and trust the others to the officers and magistrates who perform them under his authority. There is no inconvenience in trusting the decision of causes to a body of men of integrity, learning, and distinction; on the contrary, the prince can do nothing better; for, in this respect, he most effectually performs the duty he owes to his people, when he gives them judges adorned with all the qualities suitable to ministers of justice: he then has nothing more to do but to watch over their conduct, in order that they may not neglect their duty.

§ 164. The ordinary courts should determine causes relating to the revenue.

The establishment of courts of justice is particularly necessary, to decide the causes relating to the revenue; that is, all the disputes that may arise between those who are employed in behalf of the prince and the subjects. It would be very unbecoming, and highly improper for a prince,

prince, to reſolve to be judge in his own cauſe: he cannot be too much on his guard againſt the illuſions of intereſt and ſelf-love, and when he can preſerve himſelf from it, he ought not to expoſe his glory to the raſh judgments of the multitude. Theſe important reaſons ought to prevent his preferring the cauſes in which he is concerned to the miniſters and counſellors particularly attached to his perſon. In all well-regulated ſtates, in countries that are really ſtates, and not the dominions of a deſpotic prince, the ordinary tribunals decide the cauſes in which the ſovereign is concerned, with as much freedom as thoſe between private perſons.

§ 165. There ought to be eſtabliſhed ſupreme courts of juſtice, wherein cauſes ſhould be finally determined.

The end of all trials at law is juſtly to determine the diſputes that ariſe between the citizens. As then the cauſes carried before a judge, are decided, after examining all the circumſtances and proofs relating to them, it is very proper, that for the greater ſafety the party condemned, ſhould be allowed to appeal to a ſuperior tribunal, where his ſentence may be examined and reverſed, if it be found to be ill founded: but it is neceſſary that this ſupreme tribunal ſhould have the authority of pronouncing a definitive ſentence without appeal, otherwiſe the whole proceeding will be vain, and the diſpute remain undetermined.

The cuſtom of having recourſe to the prince himſelf, by laying a complaint at the foot of the throne, when the cauſe has been finally determined by a ſuperior court, appears to be ſubject to very great inconveniences. It is more eaſy to deceive the prince by ſpecious reaſons, than a number of magiſtrates well ſkilled in the knowledge of the laws; and experience too plainly ſhews, what reſources are obtained at court by favour and intrigues. If this practice be authoriſed by the laws of the ſtate, the prince ought always to fear, that theſe complaints are only formed with a view of drawing the ſuit to a great length, and deferring the ſubmiſſion to a juſt ſentence. A juſt and wiſe ſovereign will not admit them without great precautions; and though he diſſolves the decree, he ought not to try the cauſe himſelf;

ſelf; but, as is done in France, commit it to the examination of another tribunal. The ruinous length of theſe proceedings, authoriſe us to ſay, that it would be more convenient, and of greater advantage to the ſtate to eſtabliſh a ſovereign tribunal, whoſe definitive decrees ſhould not be capable of being reverſed even by the prince himſelf. It is ſufficient for the ſecurity of juſtice, that the ſovereign keeps a watchful eye over the judges and magiſtrates, in the ſame manner as over all the other officers of the ſtate, and that he has the power of the ſeeking for and puniſhing thoſe who pervert juſtice.

§ 166. The prince ought to preſerve the forms of juſtice.

As ſoon as this ſovereign tribunal is eſtabliſhed, the prince cannot interfere by his decrees, and in general he is abſolutely obliged to guard and maintain the forms of juſtice. To undertake to violate them, is rendering himſelf an arbitrary monarch, to which it can never be preſumed that a nation has willingly ſubmitted.

When theſe forms are prejudicial, it is the buſineſs of the legiſlature to reform them. This being done or procured in a manner agreeable to the fundamental laws, will be one of the moſt ſalutary benefits the ſovereign can beſtow upon a people. To preſerve the citizens from the danger of ruin by defending their rights, to ſuppreſs, and ſtifle the monſter chicanery, will be an action more glorious in the eyes of the wiſe, than all the exploits of a conqueror.

§ 167. The prince ought to maintain the authority of the judges.

Juſtice is adminiſtered in the name of the ſovereign: the prince refers it to the judgment of the courts. His part in this branch of the government is then to maintain the authority of the judges, and to cauſe their ſentence to be executed; without which they would be vain and to no purpoſe; for juſtice would not be rendered to the citizens.

§ 168. Of diſtributive juſtice. The diſtribution of employments and rewards.

There is another kind of juſtice named *attributive* or *diſtributive*, which in general conſiſts of treating every one according to his merits. This virtue in a ſtate regulates the diſtribution of public employments, honours and rewards. A nation ought, in the firſt place, to encourage good

good citizens, to excite every one to virtue by rewards and honours, and to truſt employments only to ſuch ſubjects as are capable of properly diſcharging them. If a ſovereign has the power of diſtributing his favours and employments to whomſoever he pleaſes, and nobody has a perfect right to any poſt or dignity; yet a man who by great application has enabled himſelf to become uſeful to his country, and he who has performed ſome ſignal ſervice to the ſtate, may juſtly complain if the prince overlooks them, in order to advance uſeleſs men without merit. This is treating them with an ingratitude that is very unjuſtifiable, and adapted only to extinguiſh emulation. There can be no fault that in a courſe of time can become more prejudicial to a ſtate: it introduces in it a general relaxation, and the affairs conducted by able hands cannot fail of being attended with ill ſucceſs. A powerful ſtate ſometimes maintains itſelf by its own weight; but at length it falls into decay, and this is perhaps one of the principal cauſes of thoſe revolutions obſervable in great empires. The ſovereign is attentive to the choice of thoſe he employs, while he perceives himſelf obliged to watch over his ſafety and to be on his guard: but as ſoon as he believes himſelf raiſed to ſuch a point of grandeur and power, that leaves him nothing to fear, he delivers himſelf up to caprice, and all his places are diſtributed by favour.

§ 169. The foundation of the right of puniſhing the guilty.

The puniſhment of the guilty commonly belongs to diſtributive juſtice, of which it is really a branch; ſince good order requires that thoſe puniſhments ſhould be inflicted on malefactors which they have merited. But if we would clearly eſtabliſh this on its true foundations, we ought to aſcend to firſt principles. The right of puniſhing, which in a ſtate of nature belonged to each individual, is founded on the right of ſafety. Every man has therefore a right to preſerve himſelf from injury, and by force to provide for his own ſecurity, againſt thoſe who unjuſtly attack him. For this purpoſe he may inflict a puniſhment

a puniſhment on him who has done him an injury; both to put it out of his power to hurt him for the future, and to reform him, and by his example, confine within due bounds thoſe who ſhall be tempted to imitate him. Now when men united in ſociety, that ſociety was from thence forward intruſted with the power of providing for the ſafety of its members, and for that purpoſe every one reſigned up to it the right of puniſhment. The whole body is then in protecting the citizens to revenge the injuries ſuffered by particular perſons. And as it is a moral perſon, capable alſo of being injured, it has a right to provide for its ſafety, by puniſhing thoſe who offend it; that is, it has a right to puniſh public delinquents. Hence ariſes the right of the ſword, which belongs to a nation, or to its conductor. When he uſes it againſt another nation, he makes war; when he exerts it in puniſhing a particular perſon, he exerciſes vindictive juſtice. Two things are to be conſidered in this part of government, the laws, and their execution.

§ 170. Of the laws againſt criminals.

It would be dangerous to abandon entirely the puniſhment of the guilty, to the diſcretion of thoſe who have the authority in their hands. The paſſions may interfere in affairs which ought to be regulated only by juſtice and wiſdom. The pain aſſigned previouſly to a bad action, lays a more effectual reſtraint on the wicked, than a vague fear, about which they may deceive themſelves. In ſhort, the people, who are commonly moved at the ſight of a miſerable wretch, are better convinced of the juſtice of his puniſhment, when it is inflicted by the laws themſelves. Every well-governed ſtate ought then to have its laws for the puniſhment of criminals. It belongs to the legiſlature, whatever that be, to eſtabliſh them with juſtice and wiſdom. But this is not a proper place for giving a general theory of them: we ſhall then only ſay, that each nation has a right to chooſe, on this ſubject, as well as on all others, the laws moſt agreeable to circumſtances.

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§ 171. Of the degree of punishment.

We shall only make one observation which naturally flows from this subject, and relates to the degree of punishment. From the foundation even of the right of punishing, and from the lawful end of inflicting penalties, arise the necessity of keeping them within just bounds: for since they are designed to procure the safety of the state and of the citizens, they ought never to be extended beyond what that safety requires. To say that any punishment is just, when the guilty knew before hand the miseries to which he exposed himself, is using a barbarous language, contrary to humanity and the law of nature, which forbid our doing any ill to others, unless they lay us under the necessity of inflicting it, in our own defence and for our own security. Whenever then a crime is not much to be feared in society, as when the opportunities of committing it are very rare, or when the subjects are not inclined to it, too rigorous punishments ought not to be used to suppress it. Attention ought also to be paid to the nature of the crime, and the punishment should be proportioned to the degree of injury done to the public tranquillity, and the safety of society, and the wickedness it supposes in the criminal.

These maxims are not only dictated by justice and equity; but prudence and the art of reigning recommend them with equal strength. Experience informs us, that the imagination becomes familiarized to objects that are frequently represented to it: if therefore horrible punishments are multiplied, the people will become daily less affected by them, and at length contract, like the Japanese, an ungovernable cruelty: these bloody spectacles then no longer produce the effect designed; for they cease to terrify the wicked. It is with respect to these examples as with honours; a prince who multiplies titles and distinctions to excess, soon degrades them, and makes an ill use of one of the most powerful, and most commodious springs of government. When we recollect the practice of the ancient Romans with respect to criminals, when

when we reflect on their ſcrupulous attention to ſpare the blood of the citizens, we cannot fail of being ſtruck at the facility with which it is ſpilt in moſt ſtates. Was then the Roman republic but ill governed? Is there found more order and ſafety among us? People are confined to their duty, not ſo much by the cruelty of the puniſhments, as by the exactneſs with which they are executed: and if the man guilty of ſimple robbery is puniſhed with death, what ſhall be referred to guard the life of the citizen?

§ 172. Of the execution of the laws.

The execution of the laws belong to the conductor of the ſtate: he is entruſted with the care of it, and is indiſpenſably obliged to diſcharge it with wiſdom. The prince then is to put the laws againſt criminals into execution: but he is not to attempt in his own perſon, to try the guilty. Beſides the reaſons we have already alleged in treating of civil cauſes, and which are of ſtill greater weight in regard to thoſe of a criminal nature; the character of the judge of a miſerable wretch is not at all ſuitable to the majeſty of the ſovereign, who ought in every thing to appear as the father of his people. It is a very wiſe maxim commonly received in France, that the prince ought to reſerve all matters of favour to himſelf, and abandon the rigours of juſtice to the magiſtrates. But this juſtice ought to be exerciſed in his name, and under his authority. A good prince will keep a watchful eye over the conduct of the magiſtrates; he will oblige them to obſerve ſcrupulouſly the eſtabliſhed forms, and will himſelf take care never to break through them. Every ſovereign who neglects or violates the forms of juſtice with reſpect to the guilty, makes large ſtrides towards tyranny; and there can be no liberty for the citizens, when they are not ſure, that they can only be condemned according to law, by the eſtabliſhed forms, and by their ordinary judges. The cuſtom of committing the trial of the accuſed to commiſſioners choſen at the pleaſure of the court, is a tyrannical invention of ſome miniſters who have abuſed the authority of their maſter. By this

this irregular and odious means a famous miniſter always ſucceeded in deſtroying his enemies. A good prince will never give his conſent to ſuch a proceeding, if he has ſo much diſcernment, as to foreſee the horrible abuſe that may be made of it. If the prince himſelf ought not to paſs ſentence, for the ſame reaſon he ought not to increaſe the ſentence paſſed by the judges.

§ 173. Of the right of granting a pardon.

The very nature of government requires that the executor of the laws ſhould have the power of diſpenſing with them, when this may be done without injury to any perſon, and when the welfare of the ſtate requires an exception. Hence the right of granting a pardon is one of the prerogatives of ſovereignty. But the ſovereign in his whole conduct, in his ſeverity as well as in his mercy, ought to have nothing in view but the greater advantage of ſociety. A wiſe prince knows how to reconcile juſtice and clemency, the care of the public ſafety, and the mercy due to the unhappy.

§ 174. Of polity.

Polity conſiſts in the attention of the prince and magiſtrates to preſerve every thing in order. Wiſe regulations ought to preſcribe whatever will beſt contribute to the public ſafety, utility, and convenience; and thoſe who have the authority in their hands, cannot be too attentive to their being obſerved. By a wiſe polity, the ſovereign accuſtoms the people to order and obedience, and preſerves peace, tranquillity and concord among the citizens: people have attributed to the magiſtrates of Holland ſingular talents with reſpect to polity; their towns, and even their eſtabliſhments in the Indies are generally better governed, than any other places in the known world.

§ 175. Of duels, or private combats.

Laws and the authority of the magiſtrates being ſubſtituted in the room of a private war, the conductor of a nation ought not to ſuffer individuals to attempt to do themſelves juſtice, when they may have recourſe to the magiſtrates. A duel, a combat in which people engage, on account of a private quarrel, is a manifeſt diſorder contrary

to

to the welfare of ſociety. This phrenzy was unknown to the Greeks and Romans, who raiſed to ſuch a height the glory of their arms; we received it from barbarous nations who knew no other law but the ſword. Louis XIV. deſerves the greateſt praiſes, on account of his endeavours to aboliſh this ſavage cuſtom.

§ 176. The means of putting a ſtop to this diſorder.

But why did not they make this prince obſerve, that the moſt ſevere puniſhments were incapable of curing the madneſs of duelling? They did not reach the ſource of the evils; and ſince a ridiculous prejudice had perſuaded all the nobility and gentlemen of the army, that honour obliges a man who wears a ſword to revenge, with his own hand, the leaſt injury he has received; this is the principle on which it is proper to proceed. We muſt deſtroy this prejudice, or reſtrain it by a motive of the ſame nature. While a gentleman, by obeying the law, ſhall be regarded by his equals as a coward and as a man diſhonoured; while an officer, in the ſame caſe, ſhall be forced to quit the ſervice, would you hinder his fighting by threatening him with death? He, on the contrary, will place a part of his bravery in doubly expoſing his life, in order to waſh away the affront. And certainly while the prejudice ſubſiſts, while a gentleman or an officer cannot act in oppoſition to it, without embittering the reſt of his life, I do not know whether we can juſtly puniſh him who is forced to ſubmit to its tyranny, nor whether he be very guilty with reſpect to morality. This honour, be it as falſe and chimerical as you pleaſe, is to him a very real and neceſſary bleſſing, ſince without it, he can neither live well with his equals, nor exerciſe a profeſſion that is often his only reſource. When therefore a man of a brutiſh diſpoſition would unjuſtly raviſh from him a chimera ſo eſteemed and ſo neceſſary, why may he not defend it as he would his life and treaſure againſt a robber? As the ſtate does not permit an individual to purſue with arms in his hand the uſurper of his fortune, only becauſe he may obtain juſtice from the magiſtrate;

ſtrate; ſo if the ſovereign will not allow him to draw his ſword againſt him from whom he has received an inſult, he ought neceſſarily to take ſuch meaſures that the patience and obedience of the citizen inſulted be no prejudice to him. The ſociety cannot deprive man of his natural right of making war againſt an aggreſſor, without furniſhing him with another means of ſecuring himſelf from the evil his enemy would do him: for on all thoſe occaſions where the public authority cannot lend us its aſſiſtance, we reſume our primary right of natural defence. Thus a traveller may kill without difficulty the robber who attacks him on the highway; becauſe at that inſtant he would in vain implore the protection of the laws, and of the magiſtrate. Thus a chaſte virgin would be praiſed for taking away the life of a brutal raviſher who attempted to force her to his deſires.

Till men have got rid of this Gothic idea, that honour obliges them to revenge, with their own hands, perſonal injuries by a contempt even of the laws, the moſt certain method of putting a ſtop to this prejudice would be perhaps to make a diſtinction between the offended and the aggreſſor; to grant without difficulty favour to the firſt, when it appears that his honour has been really attacked, and to puniſh without pity him that has committed the outrage. Thoſe who draw the ſword for trifles and punctilios, from pique or raillery in which honour is not concerned, I would have ſeverely puniſhed. In this manner thoſe ill-natured and impudent people would be reſtrained, who frequently oblige even the wiſe to ſuppreſs their inſolence. Every one would be on his guard, to avoid being conſidered as the aggreſſor, and being willing to obtain the advantage, ſhould a duel become neceſſary, without incurring the penalties of the law, both ſides would curb their paſſions, by which means the quarrel would fall of itſelf, and be attended with no conſequences. It frequently happens that a bully is at bottom a coward, he behaves with inſolence and offers

inſult,

inſult, with the hopes that the rigour of the law will oblige the perſon he abuſes to put up with his affronts. In the mean time the man of courage runs any danger rather than be inſulted; the aggreſſor does not dare to draw back; and a combat enſues that would not have taken place, if the laſt had reaſon to believe that the ſame law which condemns him, abſolves the offended, and that nothing can hinder the latter's puniſhing his audacity.

To this firſt law, the efficacy of which, I do not doubt, would be known by experience, it would be proper to add the following regulations. 1. Since cuſtom has allowed perſons of rank and gentlemen of the army to bear arms in time of peace, ſtrict care ſhould be taken that none but theſe ſhould be allowed to wear ſwords. 2. It would be proper to eſtabliſh a particular court, to determine, in a ſummary manner, all the affairs of honour between the perſons of theſe two orders. The marſhals court in France is in the poſſeſſion of this power; and it might be inveſted with it in a more formal and extenſive manner. The governors of provinces and ſtrong places, with their general officers, and the colonels and captains of each regiment, ſhould, for this purpoſe, be conſtituted a part of the marſhalſea. Theſe courts, each in his department, ſhould alone confer the right of wearing a ſword. Every gentleman at ſixteen or eighteen years of age, and every ſoldier at his entrance into the regiment, ſhould be obliged to appear before the court to receive the ſword. 3. On its being there delivered to each, he ſhall be informed, that it was entruſted with him only for the defence of his country, and care might be taken to inſpire him with ideas of true honour. 4. It appears to me of great importance to order very different pains and penalties, for caſes that are of a different nature. The nobility might be degraded from the honour of wearing arms, and thoſe ſuffer corporal puniſhment who ſo far forgot themſelves as to injure either in word or deed, a perſon who wears a ſword; death itſelf

itſelf ſhould even be inflicted when the affair is attended with very aggravating circumſtances, and according to my firſt obſervation, no favour ſhould be offered him, where it is followed by a duel; at the ſame time his adverſary ſhould be entirely acquitted. Thoſe who fight on ſlight occaſions, I would not have condemned to ſuffer death, unleſs in ſuch caſes where the author of the quarrel, I mean he who carried it ſo far as to draw his ſword, or to appeal to its deciſion, ſhall kill his adverſary. People hope to eſcape the puniſhment, when it is too ſevere, and beſides, a capital puniſhment, in ſuch caſes, is not conſidered as a brand of infamy. If the nobility be ſhamefully degraded from the uſe of arms, and for ever deprived of the right of bearing a ſword, without the leaſt hope of pardon: this would be the moſt proper method of reſtraining men of courage; provided that due care was taken to make a diſtinction between the guilty, according to the degree of the offence. As to perſons of mean rank, who do not belong to the army, their quarrels ought to be decided by the ordinary courts, and puniſhed for ſhedding blood according to the common laws againſt violence and murder. It ſhould be the ſame with reſpect to the quarrels that aroſe between a mean perſon and a man of the ſword: for it would be the buſineſs of the magiſtrate to preſerve peace and order among men who can have no diſputes in relation to *honour*. To protect the people againſt the violence of thoſe who bear arms, and to puniſh them ſeverely, if they ſhall dare to inſult them; might ſtill be, as it is at preſent, the buſineſs of the magiſtrate.

I dare believe that theſe regulations, and this method of proceeding would ſtifle a monſter, which the moſt ſevere laws have been unable to bind. They reach the ſource of the evil by preventing quarrels, and oppoſe a lively ſenſation of true and real honour, to that falſe and punctilious honour which has occaſioned the ſpilling of ſo much blood. It would be worthy a great monarch

to make a trial of it: the ſucceſs would immortalize his name; and by the bare attempt he would merit the love and gratitude of his people.

CHAP. XIV.

The third Object of a good Government, is to fortify itſelf againſt Attacks from without.

§ 177. A nation ought to fortify itſelf againſt attacks from without.

WE have treated at large of what relates to the felicity of a nation: the ſubject is equally rich and complicated. We come now to a third diviſion of the duties of a nation with reſpect to itſelf, to a third object of good government. One of the ends of political ſociety is to defend itſelf, by means of its union from all inſults or violence from without (§ 15.) If the ſociety is not in a condition to repulſe an aggreſſor, it is very imperfect, it wants its principal ſupport, and cannot long ſubſiſt. The nation ought to put itſelf in ſuch a ſtate as to be able to repel and humble an unjuſt enemy; this is an important duty, which the care of its perfection, and even preſervation itſelf impoſes both on the ſtate and its conductor.

§ 178. Of the power of a nation.

By its power a nation may repulſe aggreſſors, ſecure its rights, and render it every where reſpectable. Every thing invites it to neglect nothing in order to put itſelf in this happy ſituation. The power of a ſtate conſiſts in three things, the number of the citizens, their military virtues, and their riches. We may comprehend under this laſt article, fortreſſes, artillery, arms, horſes, ammunition, and, in general, all that immenſe number of particulars which are at preſent neceſſary in war, ſince they cannot be procured without money.

§ 179. The multiplication of the citizens.

The ſtate, or its conductor, ought then firſt to apply himſelf to multiply the number of the citizens, as much as is poſſible and convenient. He will ſucceed in this by making

ing plenty reign in the country; by procuring the people the means of obtaining by their labour, food for their families; by eſtabliſhing proper orders, that the inferior ſubjects, and eſpecially the labourers, be not vexed and oppreſſed by the levying of taxes; by governing with mildneſs, and in a manner that far from diſguſting and diſperſing the ſubjects, draws many new ones to the ſtate; and in ſhort, by encouraging marriage, after the example of the Romans. We have remarked (§ 149.) that this people, ſo attentive to every thing capable of increaſing and ſupporting their power, made wiſe laws againſt celibacy, and granted privileges and exemptions to married men, particularly to thoſe who had numerous families: laws that were equally wiſe and juſt, ſince a citizen who raiſes ſubjects to the ſtate, has a right to expect more favour from it, than he who deſires only to live for himſelf.

Every thing tending to depopulate a country, is a vice in a ſtate not overburdened with inhabitants. We have already ſpoken of convents and the celibacy of the prieſts. It is ſtrange that eſtabliſhments ſo directly contrary to the duties of a man and a citizen, as well as to the advantage and the ſafety of the ſociety, ſhould have found ſuch favour, and that princes ſhould be ſo far from oppoſing, as they ought, that they have protected and enriched them. A policy tending to take advantage of ſuperſtition in order to extend its power, made princes and their ſubjects miſtake their real duty, and blinded ſovereigns even with reſpect to their own intereſt. Experience ſeems at length to have opened the eyes of nations and their conductors; the pope himſelf, let us mention it to the honour of Benedict XIV. has endeavoured to reduce, by little and little, ſo palpable an abuſe; by his orders none in his dominions are any longer permitted to take the vow of celibacy before they are twenty-five years of age. This wiſe pontiff gives the ſovereigns of his communion a ſalutary example; he invites them to attend at length to the ſafety of their ſtates,

to ſhut up, at leaſt, the avenues to the gulph that ſwallows them up, if they cannot cloſe it entirely. Travel through Germany, and the other countries where the advantages are equally the ſame, and you will ſee the proteſtant ſtates twice as populous as thoſe of the catholics: compare Spain, a deſert, to England pouring forth its inhabitants: ſee fine provinces even in France, in want of men to cultivate the earth, and ſay if the thouſands of both ſexes ſhut up in convents, would not ſerve God and their country infinitely better, by producing labourers to cultivate thoſe rich fields? It is true the Swiſs catholics are very numerous: but this is owing to a profound peace and the nature of the government, which abundantly repairs the loſſes occaſioned by convents. Liberty is able to remedy the greateſt evil; it is the ſoul of a ſtate, and was with great juſtice called by the Romans *alma Libertas*.

§ 180. Of valour.

A cowardly and undiſciplined multitude are incapable of repulſing a warlike enemy: for the ſtrength of the ſtate conſiſts leſs in the number than in the military virtues of its citizens. Valour, that heroic virtue, which makes us brave dangers for the ſake of our country, is the firmeſt ſupport of the ſtate: it renders it formidable to its enemies, and ſpares the people even the trouble of defending themſelves. A ſtate whoſe reputation in this reſpect is once well eſtabliſhed, will be ſeldom attacked, if it does not provoke other ſtates by its enterpriſes. For above two centuries the Swiſs have enjoyed a profound peace, while the noiſe of arms have reſounded all around them, and war has laid waſte the reſt of Europe. Nature gives the foundation of valour; but ſeveral cauſes may animate, or weaken and deſtroy it. A nation ought then to obtain and cultivate a virtue ſo uſeful, and a prudent ſovereign will take all poſſible meaſures to inſpire his ſubjects with it, his wiſdom will point out to him the means. This is the bright fire that animates the French nobility: inflamed by a love of glory and of their prince, they fly to battle, and with the

the utmoſt gaiety ſpill their blood in the field of honour. How far would their conqueſts extend if that kingdom was not ſurrounded by people equally warlike? The Engliſh, generous and intrepid, reſemble a lion in combat, and in general, the nations of Europe ſurpaſs in bravery all the other people upon earth.

§ 181. Of other military virtues.

But valour in war does not always ſucceed; a conſtant ſucceſs is only to be obtained by an aſſemblage of all the military virtues. Hiſtory ſhews us the importance of knowledge in generals, of military diſcipline, frugality, ſtrength of body, of dexterity, and of being inured to fatigue and labour. Theſe are ſo many diſtinct parts which a nation ought carefully to improve. It was this that carried ſo high the glory of the Romans, and rendered them the maſters of the world We ſhould be miſtaken were we to believe that valour alone produced thoſe illuſtrious actions of the antient Swiſs, the victories of Morgarten, Sempach, Laupen, Morat, and many others. The Swiſs not only fought with intrepidity, they ſtudied the art of war, they were hardened by labour, they put in practice every ſtratagem, and the love of liberty itſelf made them ſubmit to a diſcipline, that could alone ſecure to them this treaſure, and ſave their country. Their troops were not leſs celebrated for their diſcipline than their bravery. Mezeray, after having given an account of the behaviour of the Swiſs at the battle of Dreux, adds theſe remarkable words: "in the opinion of all the comanders on both "ſides who were preſent, the Swiſs had in that battle, on "ſeveral trials, the ſuperiority, in point of military diſ-"cipline, over the infantry and cavalry of the French "and Germans, and acquired the reputation of being the "beſt infantry in the world [b]."

§ 182. Of riches.

In ſhort, the wealth of a nation conſtitute a conſiderable part of its power, eſpecially now, when war requires

[b] *Hiſtory of France, Tom.* II. *p.* 888.

ſuch

ſuch immenſe expences. The nation's riches are not only the revenues of the ſovereign, or the public treaſure; its opulence is alſo rated from the riches of the individuals. We commonly call a nation rich, when it contains a great number of citizens in eaſy and affluent circumſtances. The wealth of private perſons really encreaſe the ſtrength of the nation; ſince they are capable of contributing large ſums towards ſupplying the neceſſities of the ſtate, and even in a caſe of extremity, the ſovereign may employ all the riches of his ſubjects in the defence, and for the ſafety of the ſtate, in virtue of the high prerogatives with which he is inveſted, as we ſhall afterwards ſhew. The nation then ought to endeavour to acquire thoſe public and private riches, that are of ſuch uſe to it: and this is a new reaſon for encouraging a commerce with other nations, which is the ſource from whence they flow; and a new motive for the ſovereign to have his eye fixed on all the foreign trade carried on by his ſubjects in order to preſerve and protect the profitable branches, and to cut off thoſe that occaſion the exportation of gold and ſilver.

§ 183. Of the revenues of the ſtate, and taxes.

It is neceſſary that the revenues of the ſtate ſhould be proportionable to its neceſſary expences. Theſe revenues may be produced ſeveral ways; by lands reſerved for that purpoſe, by contributions, taxes, &c. but of this ſubject we ſhall treat in another place.

§ 184. The nation ought not to encreaſe its power by illegal means.

In this the nation's power conſiſts, and here it ought to augment and encreaſe it. But can it be neceſſary here to obſerve, that this can only be done by juſt and innocent methods? A laudable end is not ſufficient to legitimate the means; for theſe ought to be in their own nature lawful. The law of nature cannot contradict itſelf; if it forbids an action as unjuſt or diſhoneſt in its own nature, it can never permit it, upon any view whatſoever. And therefore if we cannot arrive at a good and lawful end, without employing unlawful means, this end ſhould be conſidered as impoſſible to be obtained, and muſt be abandoned,

abandoned. Thus we ſhall ſhew, in treating of the juſt cauſes of a war, that a nation is not allowed to attack another with a view to aggrandize itſelf, and render it ſubject to its laws. This is the ſame as if a private perſon ſhould endeavour to enrich himſelf by ſeizing the wealth of another.

§ 185. Power is relative to that of others.

The power of a nation is relative, and ought to be meaſured by that of its neighbours, or by that of all the people from whom it has any thing to fear. The ſtate is ſufficiently powerful, when it is capable of cauſing itſelf to be reſpected, and of repelling whoever would attack it. It may be placed in this happy ſituation either by its own ſtrength, in keeping it upon a level, or even raiſing it above the ſtrength of its neighbours, or by preventing their riſing to a predominant and formidable power. But we cannot ſhew here, in what caſes, and by what means, a ſtate may juſtly ſet bounds to the power of another: it is neceſſary firſt to explain the duties of a nation towards others, in order to combine them afterwards with its duties towards itſelf. We ſhall only ſay for the preſent, on this ſubject, that a nation in following the rules of prudence, and a wiſe policy, ought never to loſe ſight of thoſe of juſtice.

CHAP. XV.

Of the Glory of a Nation.

§ 186. The advantage of glory.

THE glory of a nation depends entirely on its power, and forms a very conſiderable part of it. It is this ſhining advantage that procures the eſteem of other nations, and renders it reſpectable to its neighbours. A nation whoſe reputation is well eſtabliſhed, and principally that whoſe glory is illuſtrious, is courted by all ſovereigns: they

they desire the friendship of its sovereign, and are afraid of offending him. His friends, and those who wish to become so, favour his enterprises, and the envious dare not shew their ill-will.

§ 187. How true glory, which is the duty of a nation, is to be acquired.

It is then of great advantage to a nation for it to establish its glory and reputation; and hence this becomes one of the most important of those duties it owes to itself. True glory consists in the favourable opinion of men of wisdom and discernment: it is acquired by virtue, or the qualities of the mind and the affections, and by the great actions that are the fruit of these virtues. A nation may deserve it from a double title; first, by what it does in its national character, by the conduct of those who have the administration of its affairs, and are invested with its authority and government; and secondly, by the merit of the persons of whom the nation is composed.

§ 188. The duty of the prince.

A prince, a sovereign, whoever he is, that owes every thing entirely to the nation, is doubtless obliged to extend its glory, as far as in his power. We have seen that his duty is to labour after the perfection of the state, and of the people who have submitted to him; and by this means he will make them merit a good degree of reputation and glory. He ought always to have this object in view in every thing he undertakes, and in the use he makes of his power. Let justice, moderation, and greatness of soul shine in all his actions; for by this means he will procure to himself and his people a name respected by the universe, and not less useful than glorious. The glory of Henry IV. saved France; in the deplorable state in which he found affairs, his virtues encouraged his faithful subjects, gave strangers the boldness to lend him their assistance, and to enter into an alliance with him against the ambitious Spaniards. A prince weak and but little esteemed, would have been abandoned by all the world; people would have been afraid of being involved in his ruin.

Besides

Beſides the virtues that are the glory of princes, as well as of private perſons, there is a dignity and decorum that particularly belong to the ſupreme rank, and which a ſovereign ought to obſerve with the greateſt care. He cannot neglect them without degrading himſelf, and ſtamping a blemiſh on the ſtate. Every ray that beams from the throne, ought to bear the character of purity, nobleneſs, and grandeur. What an idea do we conceive of a people, when we ſee the ſovereign ſhew in public acts a meanneſs of ſentiment, with which a private perſon would think himſelf diſhonoured? All the majeſty of the nation reſides in the perſon of the prince? what then muſt become of it, if he proſtitutes it, or ſuffers it to be proſtituted by thoſe who ſpeak an act in his name? The miniſter who treats his maſter in a language unworthy of him, deſerves to be diſgracefully driven from his poſt.

§ 189. The duty of citizens.

The reputation of private perſons is diffuſed on the nation, from a manner of ſpeaking and thinking equally common and natural. In general we attribute a virtue or a vice to a people, when that vice, or that virtue is very frequently obſerved among them. We ſay that a nation is warlike, when it produces a great number of brave warriors; that it is learned, when there are many learned men among the citizens; and that it excels in the arts, when it produces many able artiſts: on the contrary, we call it cowardly, lazy or ſtupid, when more men of thoſe characters are obſerved there than elſewhere. The citizens, who are obliged to labour with all thir power to promote the welfare and advantage of their country, not only owe to themſelves the care of deſerving a good reputation; but they alſo owe it to the nation, whoſe glory is ſo capable of being influenced by theirs. Bacon, Newton, Deſcartes, Leibnitz, and Bernoulli, have done honour to ther country, and have ſerved it greatly by the glory they have acquired. Great miniſters, and great generals, an Oxenſtiern, a Turenne, a Marlborough, a Ruiter ſerved their country

country in a double capacity, both by their actions, and their glory. On the other hand, a good citizen will find a new motive to abſtain from every diſhonourable action, from the fear of the diſhonour that may be reflected on his country. And the prince ought not to ſuffer his ſubjects to give themſelves up to vices that may caſt infamy on a nation, or only tarniſh the brightneſs of his glory: he has a right to ſuppreſs and to puniſh ſcandalous enormities, that do a real injury to the ſtate.

§ 190. The example of the Swiſs.

The example of the Swiſs is very proper to let us ſee the advantages of glory to a nation. The high reputation for valour they have acquired, and ſtill nobly maintain, has preſerved them in peace for above two centuries, and has made their aſſiſtance ſought by moſt of the powers in Europe. Louis XI. while Dauphin, was witneſs of the prodigies of valour they performed at the battle of St. James, near Baſil, and he then formed the deſign of ſtrictly engaging in his intereſt ſo intrepid a nation[a]. The twelve hundred brave men, who on this occaſion firſt defeated the vanguard of the Armagnacs, which was eighteen thouſand ſtrong; afterwards raſhly engaging the body of the army, almoſt all of them periſhed[b] without being able to complete their victory. But beſides their terrifying the enemy, and preſerving Switzerland from a ruinous invaſion, they did it great ſervice by the glory they acquired by their arms. A reputation for an inviolable fidelity is not leſs advantageous to that nation, and they have in all times been jealous of preſerving it. The canton of Zug puniſhed with death, that unworthy ſoldier who betrayed the confidence of the Duke of Milan, and diſcovered that prince to the French, when to eſcape them, he had placed himſelf in the

[a] See *The Memoires of Commines.*

[b] Of this ſmall army, "it was computed that there were eleven hundred and fifty eight killed, and thirty-two wounded. Twelve men only eſcaped, who were conſidered by their countrymen as cowards, that had preferred a life of ſhame to the honour of dying for their country." *Hiſtory of the Helvetic Confederacy, by M. de Watteville, Vol.* I. *p.* 230. and following. Tiſchudi, p. 425.

ranks

ranks of the Swiſs, who marched out of Novare dreſſed like one of thoſe ſoldiers [c].

§ 191. Attacking the glory of a nation is doing it an injury.

Since the glory of a nation is a very great advantage, it has a right to defend it; as well as any other advantages. He who attacks its glory does it an injury; and it has a right to demand, even by force of arms, a juſt reparation. We cannot then condemn thoſe meaſures, ſometimes taken by ſovereigns to maintain, or revenge the dignities of their crown. They are equally juſt and neceſſary. When they do not proceed from too high pretenſions, attributing them to a vain pride, is ſhewing ourſelves greatly ignorant of the art of reigning, and deſpiſing one of the firmeſt ſupports of the grandeur and ſafety of a ſtate.

CHAP. XVI.

Of the Protection ſought by a Nation, and its voluntary ſubmiſſion to a foreign Power.

§ 192. Of the protection.

WHEN a nation is not capable of preſerving itſelf from inſult and oppreſſion, it may procure the protection of a more powerful ſtate. If it obtains this by only engaging to perform certain articles, by paying tribute, as an acknowledgment for the ſafety obtained; by furniſhing its protector with troops, and rendering all the wars between each a common cauſe; in all other reſpects reſerving to itſelf the prerogatives of government at its pleaſure, it is a ſimple treaty of protection that does not at all derogate from its ſovereignty, and has no other difference between it, and ordinary treaties of alliance, than what ariſes from the difference it produces in the dignity of the contracting parties.

§ 193. Voluntary ſubmiſſion of one nation to another.

But they ſometimes proceed much farther, and as a nation is under an obligation to preſerve with the

[c] Vogel's hiſtorical and political treatiſe of the alliances between France and the thirteen cantons, page 75, 76.

utmoſt

utmoſt care the liberty and independence derived from nature, when it has not ſufficient ſtrength of itſelf, and is not in a condition to reſiſt its enemies, it maw lawfully ſubmit to a more powerful nation on certain conditions upon which they ſhall come to an agreement; and the pact or treaty of ſubmiſſion will be afterwards, the meaſure and rule of the rights of each. For that which ſubmits, reſigning a right it poſſeſſed, and conveying it to another, has an abſolute power to make this conveyance upon what conditions it pleaſes, and the other by accepting the ſubmiſſion on this footing, engages to obſerve religiouſly all the clauſes in the treaty.

§ 194. Several kinds of ſubmiſſion.

This ſubmiſſion may be varied to infinity, according to the will of the contracting parties: it may either leave the inferior nation a part of the ſovereignty, reſtraining it only in certain reſpects; or it may totally aboliſh it, ſo that the ſuperior nation ſhall become the ſovereign of the other; or, in ſhort, the leaſt may be incorporated with the greateſt, in order to form, from thence forward, only one ſingle ſtate, and then the citizens will have the ſame privileges as thoſe with whom they are united. The Roman hiſtory furniſhes examples of each of theſe three kinds of ſubmiſſion: as 1. The allies of the Roman people, ſuch as were for a long time the Latins, in ſeveral reſpects depended on Rome, but yet were governed according to their own laws, and by their own magiſtrates: 2. The countries reduced to Roman provinces, as Capua, whoſe inhabitants, ſubmitted abſolutely to the Romans [d]. In ſhort, the people to whom Rome granted the privilege of citizens. The emperors afterwards granted this right to all the people ſubject to the empire, and this transformed all their ſubjects into citizens.

[d] Itaque populum Campanum, in veſtram, patres conſcripti, populique Romani ditionem dedimus. Tu urbemque Capuam, argos, delubra Deum, divina humanaque, omnia, *Liv. Lib.* VII. *Cap.* 31.

In

§ 195. The rights of citizens, when the nation ſubmits to a foreign power.

In the caſe of a true ſubjection to a foreign power, the citizens who do not approve this change are not obliged to ſubmit to it; they ought to be allowed to ſell their effects and retire elſewhere. For by being entered into a ſociety, I am not obliged to follow its ſtate, when it has diſſolved itſelf, in order to ſubmit to a foreign dominion. I ſubmitted to the ſociety as it was, to live in that ſociety as the member of a ſovereign ſtate, and not in another: I ought to obey it, while it remains a political ſociety: but when it ſtrips itſelf of that quality in order to be governed by the laws of another ſtate, it cuts the knot which united its members, and thus diſcharges their obligations.

§ 196. Theſe pacts annulled by the failure of protection.

When a nation has placed itſelf under the protection of another that is more powerful, or has ſubmitted to it with a view of protection; if this laſt does not effectually grant its protection when wanted, it is manifeſt, that by failing in its engagements, it loſes all the rights it had acquired by the convention, and that the other being diſengaged from the obligation it had contracted, re-enters into the poſſeſſion of all its rights, and recovers its independence, or its liberty. It muſt be remarked, that this takes place even in the caſe where the protector does not fail in his engagements by a want of good faith, but merely through inability. For the weaker nation having ſubmitted only to obtain protection; if the other does not find itſelf in a ſituation that will admit of its fulfilling that eſſential condition, the pact is diſſolved; the weaker reſumes its right; and may, if it thinks proper, have recourſe to a more effectual protection [e]. Thus the Dukes of Auſtria, who had acquired a right of protection, and in ſome ſort a ſovereignty over the city of Lucern, not being willing, or unable to protect it effectually, that city concluded an

[e] We ſpeak here of a nation that has rendered itſelf ſubject to another, and not of one that is incorporated with another ſtate, ſo as to conſtitute a part of it. The laſt is in the ſituation of all other citizens: we ſhall treat of it in the following chapter.

alliance

alliance with the three principal cantons; and the dukes having carried their complaint to the emperor, the inhabitants of Lucern replied, "that they uſed the natural "right common to all men, by which every one is per-"mitted to endeavour to procure his own ſafety when "he is abandoned by thoſe who are obliged to grant him "aſſiſtance[f]."

§ 197. Or by the infidelity of the protected.

The law is the ſame with reſpect to the two contracting parties; if the protected does not fulfil his engagements with fidelity, the protector is diſcharged from his; he may afterwards refuſe the protection, and declare the treaty broken, in caſe the ſituation of his affairs renders ſuch a ſtep moſt for his advantage.

§ 198. And by the enterpriſes of the protector.

In virtue of the ſame principle, which diſcharges one of the contracting parties, when the other fails in its engagements, if the ſuperior power would arrogate to itſelf more privileges than the treaty of protection or ſubmiſſion allows, the other may conſider the treaty as broken, and provide for its ſafety in ſuch a manner as appears moſt prudent. If it were otherwiſe, the inferior nation would loſe by a convention which it had only formed with a view to its ſafety; and if it was ſtill bound by its engagements, when its protector abuſed and openly violated his, the treaty would become a ſnare. However as ſome have pretended, that in this caſe the inferior nation has only the right of reſiſtance and of imploring a foreign aſſiſtance; particularly as the weak cannot take too many precautions againſt the powerful, who are able to colour over their enterpriſes, the ſafeſt way is to inſert in this kind of treaty a particular clauſe, that declares it null and void whenever the ſuperior power ſhall arrogate to itſelf claims not expreſsly granted in the treaty.

§ 199. How the right of the nation protected is loſt by its ſilence.

But if the nation that is protected, or that has ſubmitted to certain conditions, does not reſiſt the enterpriſes of that power from which it has ſought ſupport; if it has made no oppoſition to them; if it preſerve a profound

[f] See *The Hiſtory of Switzerland.*

ſilence,

ſilence, when it might and ought to have ſpoken; its patience, for a conſiderable time, forms a tacit conſent that legitimates the rights of the uſurper. There can be nothing ſtable among mankind, and eſpecially among nations, if a long poſſeſſion, accompanied by the ſilence of the perſons concerned, does not produce a degree of right. But it muſt be obſerved, that ſilence, in order to ſhew a tacit conſent, ought to be voluntary. If the inferior nation proves that violence and fear prevented its giving teſtimonies of its oppoſition, nothing can be concluded from its ſilence, and it can give no right to the uſurper.

CHAP. XVII.

How a Country may ſeparate itſelf from the State of which it is a Member, or renounce the Obedience of its Sovereign when it is not protected.

§ 200. The difference between the preſent caſe and thoſe in the preceding chapter.

WE have already ſaid, that an independent people, who without becoming the members of another ſtate, have voluntarily rendered themſelves ſubject to it, in order to obtain protection, are free from its engagements as ſoon as that protection fails, even though it happens through the inability of the protector. But we ought not to conclude that it is the ſame, with any people, when their natural ſovereign, or the ſtate of which they are members, cannot ſpeedily and effectually protect them. The two caſes are very different. In the firſt, a free nation has ſubmitted to another ſtate, to obtain a ſhare in all its advantages, and to be protected in common with its own ſubjects; if the latter is willing to grant the favour, it may be incorporated and not ſubjected; for it ſacrificed its liberty with the ſole view of being protected, without the hope of any other return. When therefore the only neceſſary condition of its ſubjection fails, in whatſoever manner it happened

happened it is free from its engagements, and its duty towards itſelf obliges it to take freſh methods to provide for its own ſecurity. But the ſeveral members of the ſame ſtate equally participating in all the advantages it procures, ought conſtantly to ſupport it: they have promiſed to remain united, and to render it, on all occaſions, the common cauſe. If thoſe who are menaced or attacked, may ſeparate themſelves from the others to avoid a preſent danger, every ſtate would ſoon be diſſipated and deſtroyed. It is then eſſentially neceſſary for the ſafety of ſociety, and even for the welfare of all its members, that each party ſhould with all its power reſiſt a common enemy, rather than ſeparate from the other, and this is conſequently one of the neceſſary conditions of the polical aſſociation. The natural ſubjects of a prince are attached to him without any other reſerve, than the obſervation of the fundamental laws; they ought to remain faithful to him, juſt as he is obliged to take care to govern them well: they have one common intereſt; they with him make only one whole, one and the ſame ſociety. It is then an eſſential and neceſſary condition of the political ſociety, that the ſubjects remain united to their prince, as much as in their power.

§ 201. The duty of the members of a ſtate, where the ſubjects of a prince are in danger.

When therefore, a city, or a province is threatened, or actually attacked; it cannot deliver itſelf from danger, by ſeparating from the ſtate of which it is a member, or abandon its natural prince, even when it is not in his power to give it a preſent and effectual aſſiſtance. Its duty, its political engagements oblige it to make the greateſt efforts, in order that it may ſtill remain in its preſent ſtate. If it is overcome by force, neceſſity that irreſiſtible law, frees it from its firſt engagement, and gives it a right to treat with the conqueror, in order to obtain the beſt conditions poſſible. If it muſt either ſubmit to him or periſh, who can doubt, but that it may, and even that it ought, to chuſe the firſt? The modern cuſtom is conformable to this deciſion: a city ſubmits to the enemy when it cannot expect

expect ſafety from a vigorous reſiſtance; it takes an oath of fidelity to him, and its ſovereign accuſes none but fortune.

§ 202. Their right when they are abandoned.

The ſtate is obliged to defend and preſerve all its members (§ 17.), and the prince owes the ſame aſſiſtance to his ſubjects. If he refuſes, or neglects to ſuccour a people, who find themſelves in imminent danger, this people being thus abandoned, become abſolutely at liberty to provide for their own ſecurity and ſafety, in a manner moſt agreeable to them without ſhewing the leaſt regard to thoſe who fail to aſſiſt them. The country of Zug attacked by the Swiſs in 1352, ſent for ſuccour to the Duke of Auſtria its ſovereign, but that prince being employed in talking of his birds, when the deputies appeared before him, would ſcarcely condeſcend to hear them; upon which this people, thus abandoned, entered into the Helvetic confederacy[g]. The city of Zurich was in the ſame ſituation the year before. Being attacked by the rebellious citizens, ſupported by the neighbouring nobility, and by the houſe of Auſtria, it applied to the head of the empire; but Charles IV. who was then emperor, declared that he could not defend it; upon which Zurich ſecured its ſafety, by an alliance with the Swiſs[h]. The ſame reaſon has authoriſed the Swiſs in general, to ſeparate themſelves intirely from the empire, which never protected them in any emergency: they had not owned its authority for a long time when their independence was acknowledged by the Emperor, and the whole Germanic body at the treaty of Weſtphalia.

[g] See Etterlin, Simber and de Watteville, *ubi ſupra*.

[h] See the ſame hiſtorians, and Bullinger, Stumpf, Tſchudi, and Stettler.

CHAP. XVIII.

Of the Eſtabliſhment of a Nation in a Country.

§ 203. The poſſeſſion of a country by a nation.

HITHERTO we have conſidered the nation merely with reſpect to itſelf, without any regard to the country it poſſeſſes. Let us now ſee it eſtabliſhed in a country, which becomes its own property and inheritance. The earth belonged to all men in general; deſtined by the Creator to be their common habitation, and nurſing-mother, all derived from nature the right of inhabiting it, and drawing from it the things neceſſary for their ſubſiſtence, and thoſe ſuitable to their wants. But the human race being extremely multiplied, the earth became no longer capable of furniſhing ſpontaneouſly, and without culture, ſupport for its inhabitants; and could not receive a proper cultivation from the itinerant nations who had poſſeſſed it in common. It then became neceſſary that theſe people ſhould fix themſelves on ſome part of it, and that they ſhould appropriate to themſelves portions of land, in order that not being diſturbed in their labour, nor diſappointed in obtaining the fruits of their induſtry, they might apply themſelves to render their lands fertile, that they might draw their ſubſiſtence from them. This muſt have introduced the rights of property and dominion, and this fully juſtifies their eſtabliſhment. Since their introduction, the common right of all mankind is reſtrained to what each lawfully poſſeſſes. The country inhabited by one nation, whether it has tranſported itſelf thither, or whether the families of which it was compoſed, finding themſelves ſpread over the country, had formed themſelves into the body of a political ſociety; this country, I ſay, is the ſettlement of the nation, and it has a proper and excluſive right to it.

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This right comprehends two things: 1. The *domain*, in virtue of which the nation alone may uſe this country for the ſupply of its neceſſities, and may diſpoſe of it in ſuch a manner, and derive from it ſuch advantages, as it thinks proper. 2. The *empire* or the right of ſovereign command, by which the nation ordains and regulates at its pleaſure, every thing that paſſes in the country.

§ 204. Its right over the parts in its poſſeſſion.

When a nation takes poſſeſſion of a country that never yet belonged to another, it is conſidered as poſſeſſing there the *empire* or ſovereignty, at the ſame time with the *domain*. For ſince it is free and independent, it can have no intention of ſettling in a country, to leave to others the right of command, or any of thoſe that conſtitute ſovereignty. The whole ſpace over which a nation extends its government is the ſeat of its juriſdiction, and called its *territory*.

§ 205. The poſſeſſion of the empire in a vacant country.

If many free families ſpread over an independent country, come to unite, in order to form a nation or ſtate, they altogether poſſeſs the empire over the whole country they inhabit. For they already poſſeſs each for himſelf the domain; and ſince they are willing to form together a political ſociety, and eſtabliſh a public authority, which each ſhould be bound to obey, it is very manifeſt that their intention is, to attribute to that public authority, the right of command over the whole country.

§ 206. Another manner of poſſeſſing the empire of a country.

All mankind have an equal right to the things that have not yet fallen into the poſſeſſion of any one; and theſe things belong to the firſt poſſeſſor. When therefore a nation finds a country uninhabited and without a maſter, it may lawfully take poſſeſſion of it: and after it has ſufficiently made known its will in this reſpect, it cannot be deprived of it by another. Thus navigators going on the diſcovery, furniſhed with a commiſſion from their ſovereign, and meeting with iſlands, on other deſert countries, have taken poſſeſſion of them in the name of their nation: and this title has been commonly reſpected, provided it was ſoon after followed by a real poſſeſſion.

§ 207 How a nation appropriates to itſelf a deſert country.

§ 208. A question on this subject.

But it is questioned whether a nation may thus appropriate to itself, by merely taking possession of a country, which it does not really occupy, and in this manner reserve to itself much more than it is able to people or cultivate. It is not difficult to determine, that such a pretension would be absolutely contrary to the law of nature, and opposite to the views of nature, who appointed all the earth to supply the wants of man in general, gave to no nation the right of appropriating to itself a country but for the use it makes of it, and not to hinder others from improving it. The law of nations then only acknowledges the property and sovereignty of a nation over uninhabited countries, of which they shall really, and in fact, take possession, in which they shall form settlements, or of which they shall make actual use. In reality, when navigators have met with desert countries in which those of other nations have erected some monument to shew their having taken possession of them, they have no farther given themselves any pain about that vain ceremony, than as it proceeded from the regulation of the popes, who divided a great part of the world between the crowns of Castile and Portugal [1].

There

1 These decrees being of a very singular nature, and hardly any where to be found but in very scarce books, the reader will not be displeased with seeing here an extract of them.

The bull of Alexander VI. by which he gives to Ferdinand and Isabella, King and Queen of Castile and Arragon, the New World, discovered by Christopher Columbus.

"Motu proprio, says the Pope, non "ad vestram, vel alterius pro vobis "super hoc nobis oblatæ petitionis "instantiam, sed de nostra mera libe- "ralitate, & ex certa scientia, ac de "apostolicæ potestatis plenitudine, "omnes insulas & terras firmas, in- "ventas, & inveniendas, detectas & "detegendas versus occidentem & "meridiem" (drawing a line from one pole to the other, at an hundred leagues to the west of the Azores) "auctoritate omnipotentis Dei no- "bis in beato Petro concessâ, ac vi- "cariatûs Jesû Christi, quâ fungimur "in terris, cum omnibus illarum do- "miniis, civitatibus, &c. vobis hæ- "redibusque & successoribus vestris "Castellæ & Legionis regibus in "perpetuum tenore præsentim dona- "mus, concedimus, assignamus, vos- "que & hæredes ac successores præ- "fatos illorum Dominos cum plena, "libera & omnimoda potestate, auc- "toritate & jurisdictione facimus, "constituimus & deputamus." The Pope excepts only what might be in the possession of some other Christian prince before the year 1493. As if he had the greatest right to give what belonged to nobody, and especially what was possessed by the American nations; he adds: "Ac quibuscun- "que personis cujuscunque dignita- "tis,

§ 209. If it be permitted to poſſeſs a part of a country, in which there are found none but a ſmall number of wandering people.

There is another celebrated queſtion, to which the diſcovery of the new world has principally given riſe. It is aſked if a nation may lawfully take poſſeſſion of a part of a vaſt country, in which there are found none but erratic nations, incapable, by the ſmallneſs of their numbers to people the whole? We have already obſerved (§ 81.) in eſtabliſhing the obligation to cultivate the earth, that theſe nations cannot excluſively appropriate to themſelves more land than they have occaſion for, and which they are unable to ſettle and cultivate. Their removing their habitations through theſe immenſe regions, cannot be taken for a true and legal poſſeſſion; and the people of Europe, too cloſely pent up, finding land of which theſe nations are in no particular want, and of which they make no actual and conſtant uſe, may lawfully poſſeſs it, and eſtabliſh colonies there. We have already ſaid, that the earth belongs to the human race in general, and was deſigned to furniſh it with ſubſiſtence: if each nation had reſolved from the beginning to appropriate to itſelf a vaſt country, that the people might live only by hunting, fiſhing, and wild fruits, our globe would not be ſufficient to maintain the tenth part of its preſent inhabitants. People have not then deviated from the views of nature in confining the Indians within narrower limits. However, we cannot help praiſing the moderation of the Engliſh puritans who firſt ſettled in New England; who, notwithſtanding their being furniſhed with a charter from their ſovereign, purchaſed of the Indians the land they reſolved to cultivate[k]. This laudable example was followed

" tis, etiam imperiales & regalis, ſta-
" tûs, gradûs, ordinis, vel conditionis
" ſub excommunicationis latæ ſenten-
" tiæ pœnâ, quam eo ipſo, ſi contra
" fecerint, incurrant, diſtrictiùs inhi-
" bemus ne ad Inſulas & Terras Fir-
" mas inventas & inveniendas, de-
" tectas, & detegendas, verſus occi-
" dentem & meridiem—pro merci-
" bus habendis, vel quavis alia de
" cauſa accedere præſumant abſque
" veſtra ac hæredum & ſucceſſorum
" veſtrorum prædictorum licentia
" ſpeciali, &c. Datum Romæ apud
" S. Petrum anno 1493. nonas Maji,
" Pontific. noſtri anno 1°." *Leibnitii Codex Juris Gent. Diplomat.* 203.

See *ibid Diplom.* 165. The bull by which Pope Nicholas V. gave to Alphonſus, King of Portugal, and to the infant Henry, the empire of Guinea, and the power of ſubduing the barbarous nations of thoſe countries, forbidding any other to ſail thither, without the permiſſion of Portugal. This act is dated Rome on the 6th of the ides of January, 1454.

[k] *Hiſtory of the Engliſh Colonies in North America.*

by

by Mr. William Penn, who planted the colony of quakers in Pennſylvania.

§ 210. Of colonies.

When a nation takes poſſeſſion of a diſtant country, and ſettles a colony there, that country, though ſeparated from the principal eſtabliſhment, or mother-country, naturally becomes a part of the ſtate, equally with its ancient poſſeſſions. Whenever therefore the political laws, or treaties, make no diſtinction between them, every thing ſaid of the territory of a nation, ought alſo to extend to its colonies.

CHAP. XIX.

Of the Country, and the ſeveral Things that relate to it.

§ 211. What is our country.

THE whole of a country poſſeſſed by a nation and ſubject to its laws, forms, as we have already ſaid, its territories; and it is the common country of all the individuals of the nation. We have been obliged to anticipate the definition of the term *our country* (§ 112.) becauſe our ſubject led us to treat of the love of our country, a virtue extremely excellent and neceſſary in a ſtate. Suppoſing then, this definition already known, it remains that we ſhould here explain ſeveral things that have a relation to it, and anſwer the queſtions that have been made on this ſubject.

§ 212. Of the citizens and natives.

The citizens are the members of the civil ſociety: bound to this ſociety by certain duties, and ſubject to its authority, they equally participate in its advantages. The *natives* or *indigenes*, are thoſe born in the country of parents who are citizens. Society not being able to ſubſiſt, and perpetuate itſelf, but by the children of the citizens; thoſe children naturally follow the condition of their fathers, and ſucceed to all their rights. The ſociety is ſuppoſed to deſire this; in conſequence of what it owes to its own preſervation; and it is preſumed that each citizen, on entering into ſociety, reſerves to his children the right of their becoming members. The country of the

the fathers is then that of the children; and these become true citizens, merely by their tacit consent. We shall soon see, whether on their arriving at the age of reason, they may renounce their right, and what they owe to the society in which they are born. I say, that in order to be of the country, it is necessary that a person be born of a father who is a citizen; for if he is born there of a stranger, it will be only the place of his birth, and not his country.

§ 213. Of the inhabitants.

The inhabitants, as distinguished from citizens, are strangers, who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the laws, or custom gives them. The *perpetual inhabitants* are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united, and subject to the society, without participating in all its advantages. Their children follow the condition of their fathers; and as the state has given to these the right of perpetual residence, their right passes to their posterity.

§ 214. Naturalization.

A nation, or the sovereign who represents it, may grant to a stranger, the quality of citizen, by admitting him into the body of the political society. This is called *naturalization*. There are states in which the sovereign cannot grant to a stranger all the rights of the citizens, for example, that of possessing places of trust, and consequently where he has the power of granting only an imperfect naturalization. It is here a regulation of the fundamental law, which limits the power of the prince. In other states, as in England and Poland, the prince cannot naturalize a single person, without the concurrence of the nation represented by its deputies. In England, however, being born in the country, naturalizes the children of a foreigner.

It

§ 215. Of the children of citizens born in a foreign country.

It is aſked, whether the children born of citizens in a foreign country, are citizens? The laws have decided this queſtion in ſeveral countries, and it is neceſſary to follow their regulations. By the law of nature alone, children follow the condition of their fathers, and enter into all their rights (§ 212.); the place of birth produces no change in this particular, and cannot of itſelf furniſh any reaſon for taking from a child what nature has given him; I ſay of itſelf, for the civil law, or politics may order otherwiſe, from particular views. But I ſuppoſe that the father has not entirely quitted his country in order to ſettle elſewhere. If he has fixed his abode in a foreign country, he is become the member of another ſociety, at leaſt as a perpetual inhabitant, and his children are ſo too.

§ 216. Of children born at ſea.

As to the children born at ſea; if they are born in thoſe parts of it that are poſſeſſed by the nation, they are born in the country: if it is in the open ſea, there is no reaſon to diſtinguiſh them from thoſe who are born in the country; for it is not naturally the place of birth that gives rights, but extraction: and if the children are born in a veſſel belonging to the nation, they may be reputed born in its territories; for it is natural to conſider the veſſels of a nation as parts of its territory, eſpecially when they ſail upon a free ſea, ſince the ſtate preſerves its juriſdiction in theſe veſſels. And as, according to the commonly received cuſtom, this juriſdiction is preſerved over the veſſels, even in parts of the ſea ſubject to a foreign dominion, all the children born in the veſſels of a nation, are conſidered as born in its territory. By the ſame reaſon thoſe born in a foreign veſſel are reputed born in a foreign country, at leaſt if it is not in the very part of the nation; for the part is more particularly the territory, and the mother, by being at that moment in a foreign veſſel, is not out of the country. I ſuppoſe that ſhe and her huſband have not quitted the country to ſettle elſewhere.

It

§ 217. Of the children born in the armies or the ſtate, or in the houſe of its miniſter at a foreign court.

It is from the ſame reaſons that the children born out of the country in the armies of the ſtate, or in the houſe of its miniſter at a foreign court, are reputed born in the country; for a citizen abſent from his family on the ſervice of the ſtate, and who lives under its dependence and juriſdiction, cannot be conſidered as being gone out of its territory.

§ 218. Of the domicil.

The *domicil* is the habitation fixed in any place with an intention of always ſtaying there. A man does not then eſtabliſh his domicil in any place, unleſs he makes ſufficiently known his intention of fixing there, either tacitly, or by an expreſs declaration. However, this declaration is no reaſon why, if he afterwards changes his mind, he may not remove his domicil elſewhere. In this ſenſe, he who ſtops, even for a long time, in a place, for the management of his affairs, has only a ſimple habitation there, but has no domicil. Thus the envoy of a foreign prince has not his domicil at the court where he reſides.

The *natural* or *original domicil*, is that given us by birth, where our father had his; and we are conſidered as retaining it, till we have abandoned it; in order to chuſe another. The *domicil acquired (adſcititium)* is that where we ſettle by our own choice.

§ 219. Of vagabonds.

Vagabonds are people who have no domicil. Conſequently thoſe born of vagabond parents have no country, ſince a man's country is the place, where at the time of his birth, his parents had their domicil (§ 122.), or it is the ſtate of which his father was then a member; which comes to the ſame point, for to ſettle for ever in a nation, is to become a member of it, at leaſt as a perpetual inhabitant, if he has not all the privileges of a citizen. However, we may conſider the country of a vagabond to be that of his child, while that vagabond is conſidered as not having abſolutely renounced his natural or original domicil.

§ 220. If a perſon may quit his country.

Many diſtinctions will be neceſſary in order to give a complete ſolution to the celebrated queſtion, whether a man

man may quit his country or the ſociety of which he is a member? 1. The children have a natural attachment to the ſociety in which they are born: being obliged to acknowledge the protection it has granted to their fathers, they are obliged to it, in a great meaſure for their birth and education. They ought then to love it, as we have already ſhewn (§ 122), expreſs a juſt gratitude to it, and as much as poſſible return benefit for benefit. We have juſt obſerved (§ 212.) that they have a right to enter into the ſociety of which their fathers were members. But every man born free; the ſon of a citizen, arrived at years of diſcretion, may examine whether it be convenient for him to join in the ſociety for which he was deſtined by his birth. If he finds that it will be of no advantage to him to remain in it, he is at liberty to leave it, making a return for what it has done in his favour[1], and preſerving, as much as his new engagements will allow him, the ſentiments of love and gratitude he owes it. Moreover a man's obligations to his natural country may change, leſſen or entirely vaniſh, according as he ſhall have quitted it lawfully, and with good reaſon, in order to chuſe another, or has been driven from it meritoriouſly, or contrary to juſtice, in due form of law, or by violence.

2. As ſoon as the child of a citizen arrives at manhood, and acts as a citizen, he tacitly aſſumes that character; his obligations, like thoſe of others who enter expreſsly and in due form into engagements with ſociety, become ſtronger and more extenſive: but the caſe is very different with reſpect to him of whom we have been ſpeaking. When a ſociety has not been contracted for a determinate time, it is allowable to quit it, when that ſeparation can be of no detriment to the ſociety. A citizen may then quit the ſtate of which he is a member, provided it be not in ſuch a conjuncture, when he cannot abandon it without doing it a remarkable prejudice. But we muſt here diſ-

[1] This is the foundation of the cuſtoms paid by foreigners.

tinguiſh

tinguiſh what may be done according to the rigour of right, from what is honeſt and conformable to every duty: and, in a word, the *internal* from the *external* obligation. Every man has a right to quit his country, in order to ſettle in any other, when by that ſtep he does not expoſe the welfare of his country. But a good citizen will never reſolve to do it without neceſſity, or without very ſtrong reaſons. There is but little honeſty in abuſing our liberty, by quitting our aſſociates upon ſlight pretences, after having drawn conſiderable advantages from them, and this is the caſe of every citizen with reſpect to his country.

3. As to thoſe who have the cowardice to abandon it in a time of danger, ſeeking to ſecure themſelves inſtead of defending it; they manifeſtly violate the pact of ſociety, by which they engaged to defend themſelves in an united body, and in concert: theſe are infamous deſerters which the ſtate has a right to puniſh ſeverely.

§ 221. How a perſon may abſent himſelf for a time.

In a time of peace and tranquillity, when the country has no real need of all her children, the welfare even of the ſtate and that of the citizens, requires that any of them may travel for the management of their own affairs, provided that they be always ready to return, as ſoon as the public intereſt recalls them. It is not preſumed that any man has engaged towards the ſociety of which he is a member, never to leave the country when the welfare of his affairs require it, and when he can abſent himſelf without injury to his country.

§ 222. The variation of the political laws in this reſpect. Theſe muſt be obeyed.

The political laws of nations vary greatly in this reſpect. Among ſome all citizens are conſtantly permitted to abſent themſelves, except in the caſe of an actual war, and even to quit the country entirely when they think proper, without alledging any reaſon for it. This licence, is in its own nature contrary to the welfare and ſafety of the ſociety, and can no where be tolerated, but in a country without reſources incapable of ſupplying the wants of its inhabitants. In ſuch a country there can only

only be an imperfect ſociety; for it is neceſſary that the civil ſociety ſhould be able to place the members in a condition to procure by their labour and induſtry all the neceſſaries of life: without which it has no right to require them to devote themſelves entirely to it. In other ſtates every one may freely travel for the management of his affairs, but not entirely leave the country without the expreſs permiſſion of the ſovereign. In ſhort, there are others where the rigour of the government will not permit any one whatſoever to leave his country, without paſſports in form, which are even not granted without great difficulty. In all theſe caſes it is neceſſary to conform to the laws, when they are made by a lawful authority. But in the laſt the ſovereign abuſes his power, and reduces his ſubjects to an inſupportable ſlavery, if he refuſes them the permiſſion of leaving his dominions for their own advantage, when he might grant it them without inconvenience or danger to the ſtate. We are going even to ſhew, that on certain occaſions he cannot detain, on any pretence whatſoever, thoſe who would go in order never to return.

§ 223. Caſes in which a citizen has a right to quit the country.

There are caſes in which a citizen has an abſolute right to renounce his country, and abandon it entirely. 1. If the citizen cannot procure ſubſiſtence in his own country, he is doubtleſs permitted to ſeek it in another. For the political or civil ſociety being entered into only with a view of facilitating to each the means of living in happineſs and ſafety, it would be abſurd to pretend that a member, whom it cannot furniſh with ſuch things as are moſt neceſſary, has not a right to leave it.

2. If the body of the ſociety, or he who repreſents it, abſolutely neglects to fulfil his obligations to a citizen, he may retire. For if one of the contracting parties does not obſerve his engagements, the other is no longer bound to fulfil his. The contract is reciprocal between the ſociety and its members; and on this foundation the ſociety may alſo expel a member who violates its laws.

3.

3. If the major part of the nation, or the ſovereign who repreſents it, would eſtabliſh laws, on things to which the pact of ſociety cannot oblige a citizen to ſubmit, thoſe who are averſe to theſe laws have a right to quit the ſociety, in order to enter into another. For inſtance, if the ſovereign or the greateſt part of the nation, will permit the exerciſe of only one religion in the ſtate, thoſe who believe and profeſs another religion have a right to retire, and to take with them their families or effects. For they never could ſubject themſelves to the authority of men, in affairs of conſcience[m]; and if the ſociety ſuffers, and is weakened by their departure, the blame ought to be laid on its want of toleration; theſe are the laſt who break the pact of ſociety, and force the others to ſeparate from it. We have elſewhere touched upon ſome other examples of this third caſe: that of a popular ſtate, which is reſolved to have a ſovereign (§ 33.), and that of an independent nation, taking the reſolution to ſubmit to a foreign power (§ 195.).

§ 224. Of emigrants.

Thoſe who quit their country from a lawful reaſon, with a deſign to ſettle elſewhere, are called *emigrants*, and take their families and fortunes with them.

§ 225. Sources of their right.

The right of emigration may ariſe from ſeveral ſources. 1. The caſe we have juſt mentioned (§ 223.); this is a natural right which is certainly excepted in the pact of aſſociation.

2. The emigration may, in certain caſes be ſecured to the citizens by a fundamental law of the ſtate. The citizens of Neufchatel and Valengen in Switzerland may quit the country and carry off their effects, in what manner they pleaſe, without paying any duties.

3. It may be voluntarily granted them by the ſovereign.

4. In ſhort, this privilege may ariſe from ſome treaty made with a foreign power, by which a ſovereign has promiſed to leave full liberty to thoſe of his ſubjects, who

[m] See the above chapter on religion.

for

for a certain reaſon, on account of religion for inſtance, deſire to tranſplant themſelves into the territories of that power. There are ſuch treaties between the German princes in particular, with reſpect to religion. There are alſo the ſame in Switzerland, a citizen of Bern may if he pleaſes remove to Fribourg, and reciprocally a citizen of Fribourg may go and ſettle at Bern, in order to profeſs the religion of the country, and he has a right to take all his effects with him.

It appears from ſeveral hiſtorical facts, particularly in the hiſtory of Switzerland and the neighbouring countries, that the law of nations, eſtabliſhed there by cuſtom for ſome ages paſt, does not permit a ſtate to receive the ſubjects of another ſtate into the number of its citizens. This vicious cuſtom had no other foundation than the ſlavery to which the people were then reduced. A prince, a lord, conſidered his ſubjects in the rank of his property and riches, he calculated their number, as he did his flocks; and to the diſgrace of human nature, this ſtrange abuſe is not yet every where deſtroyed.

§ 226. If the ſovereign endeavours to deprive them of this right, he does them an injury.

If the ſovereign attempts to ſtop thoſe who have the right of emigration, he does them an injury, and this people may lawfully implore the protection of the power who would receive them. Thus we have ſeen Frederic William, King of Pruſſia, grant his protection to the emigrant proteſtants of Saltſburgh.

§ 227. Of ſupplicants.

The name of *ſupplicants* is given to all the fugitives who implore the protection of a ſovereign, againſt the nation or prince they have quitted. We cannot ſolidly eſtabliſh what the law of nations has determined on their account, before we have treated of the duties of one nation towards others.

§ 228. Of exile and baniſhment.

In fine, *exile* is another manner of leaving our country. An *exile* is a man driven from the place of his domicil, or conſtrained to leave it, but without a mark of infamy. Baniſhment is a like expulſion, with a mark of infamy.

famy [n]. Both may be for a limited time, or for ever. If an exile or baniſhed man reſided in his own country, he is exiled or baniſhed from this country. It is however proper to obſerve, that it is commonly cuſtomary alſo to apply the terms of exile and baniſhment to the expulſion of a ſtranger out of the country where he had not his domicil, with an expreſs prohibition of his ever returning.

A man may be deprived of any right whatſoever by way of puniſhment, therefore exile, which deprives him of the right of dwelling in a certain place, may be conſidered as a puniſhment: baniſhment is always one; for a mark of infamy cannot be ſet on any one; but with the view of puniſhing him for a fault, either real or pretended.

When the ſociety has excluded one of its members by a perpetual baniſhment, he is only baniſhed from the lands of that ſociety, and it cannot hinder him from living wherever elſe he pleaſes; for after having driven him out, it can have no authority over him. However, the direct contrary may take place by particular conventions between two or more ſtates. Thus every member of the Helvetic confederacy may baniſh its own ſubjects out of the territories of Switzerland; upon which the baniſhed man would not be allowed to live in any of the cantons, or in the territories of their allies.

Exile is divided into *voluntary* and *involuntary*. It is voluntary, when a man quits his domicil, to eſcape ſome puniſhment, or to avoid ſome calamity; and, involuntary, when it is the effect of a ſuperior order.

Sometimes an exile is preſcribed the place where he is to remain during his exile; or a certain ſpace is mentioned which he is forbid to enter. Theſe various circumſtances

[n] The cuſtoms of mankind do not oppoſe the ſenſe we have given to theſe two terms. The French academy ſays: "Baniſhment is only "uſed in conſequence of a ſentence "paſſed in a court of juſtice; and "exile, is only the being ſent on ac- "count of ſome diſgrace at court." Thus ſuch a condemnation inflicted by juſtice, is infamous; and that proceeding from having offended the court, is not uſually ſo.

and

and modifications depend on him who has the power of ſending him into exile.

§ 229. The exile and baniſhed man have a right to live elſewhere.

A man, by being exiled or baniſhed does not loſe his quality as a man, and conſequently his right to dwell on any other part of the earth. He derives this right from nature, or rather from its author, who has appointed the earth for the habitation of mankind; and the introduction of property could not prejudice the right which all men receive by birth to the uſe of ſuch things as are abſolutely neceſſary.

§ 230. The nature of this right.

But though this right is neceſſary and perfect in the general view of it, it muſt be obſerved, that it is but imperfect in regard to each particular country. For every nation has a right of refuſing to admit a ſtranger into the country, when he cannot enter it, without putting it in evident danger, or without doing it a remarkable prejudice. What it owes to itſelf, the care of its own ſafety, gives it this right; and in virtue of its natural liberty, the nation is to judge, whether it is, or is not in a proper ſituation to receive this ſtranger (Prelim. § 16.). He cannot then ſettle by a full right, and, as he pleaſes, in the place he has choſen; but he ought to demand the permiſſion of doing it of the ſuperior of the place; and if it is refuſed, it is his place to ſubmit.

§ 231. The duty of nations towards them.

However, as property could not be introduced to the prejudice of the right acquired by every human creature of not being abſolutely deprived of ſuch things as are neceſſary: no nation can refuſe, without good reaſons even the perpetual reſidence of a man driven from his country. But if particular and ſolid reaſons, hinder its giving him an aſſylum, this man has no longer any right to demand it; becauſe in ſuch a caſe, the country inhabited by the nation cannot, at the ſame time, ſerve for its own uſe, and that of this ſtranger. Now, even ſuppoſing that things are ſtill in common, nobody can arrogate to himſelf the uſe of a thing which actually ſerves to ſupply the wants of another. Thus a nation, whoſe lands are ſcarcely ſufficien

ſufficient to ſupply the wants of the citizens; is not obliged to receive a company of fugitives or exiles. Therefore it ought abſolutely to reject them, as much as if they were infected by a contagious diſeaſe. Thus it has a right to ſend them elſewhere, if it has juſt cauſe to fear, that they will corrupt the manners of the citizens; that they will create religious diſturbances, or occaſion ſome other diſorder, contrary to the public ſafety. In a word, it has a right, and is even obliged in this reſpect, to follow the rules which prudence dictates. But this prudence ought not to be contracted and gloomy; it ſhould not be carried ſo far as to refuſe a retreat to the unfortunate for ſlight reaſons, and on groundleſs and frivolous fears. The means of tempering it will be never to loſe ſight of that charity and commiſeration which are due to the unhappy. We cannot refuſe theſe ſenſations even to thoſe who have fallen into misfortunes through their own fault. For we ought to hate the crime, and to love the criminal, ſince all mankind ought to love each other.

§ 232. A nation cannot puniſh faults committed out of its territories.

If an exile or baniſhed man is driven from his country for any crime, it does not belong to the nation in which he has taken refuge, to puniſh him for a fault committed in a foreign country. For nature gives to mankind, and to nations, the right of puniſhing, only for their defence and ſafety (§ 169.); whence it follows, that he can only be puniſhed by thoſe he has offended.

§ 233. If the public ſecurity of the human race is not concerned.

But this reaſon ſhews, that if the juſtice of each nation ought in general to be confined to the puniſhment of crimes committed in its own territories; we ought to except from this rule, the villains who by the quality and habitual frequency of their crimes, violate all public ſecurity, and declare themſelves the enemies of the human race. Poiſoners, aſſaſſins, and incendiaries by profeſſion may be exterminated wherever they are ſeized; for they attack and injure all nations, by trampling under foot the foundations of their common ſafety. Thus pirates are

brought to the gibbet by the first into whose hands they fall. If the sovereign of the country where crimes of that nature have been committed, reclaims the authors of them, in order to bring them to punishment, they ought to be restored to him, as to one who is principally interested in punishing them in an exemplary manner. And it being proper to convict the guilty, and to try them according to some form of law, this is a second reason why malefactors are usually delivered up at the desire of the state where their crimes have been committed.

CHAP. XX.

Of public, common, and private Property.

§ 234. Of what the Romans called *res communes.*

LET us now see of what nature are the different things included in a country possessed by a nation, and endeavour to establish the general principles of the law by which they are regulated. This subject is treated by civilians under the title of *de rerum divisione.* There are things which in their own nature cannot be possessed; there are others, the property of which nobody can attribute to himself, and that remain common, when a nation takes possession of a country: the Roman civilians called these things *res communes*, things common: such were among them, the air, the running-water, the sea, the fish, and the wild beasts.

§ 235. The entire wealth of a nation and its divisions.

Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all these benefits in the same manner. Those not divided between particular communities, or among the individuals of a nation, are called *public property.* Some are reserved for the necessities of the state, and form the domain of the crown, or of the republic; and others remain common to all the citizens, who take advantage of them,

them, each according to his neceſſities, or according to the laws which regulate their uſe, and theſe are called *common property*. There are others that belong to ſome body or community, termed *common property*, *res univerſitatis*; and theſe are with reſpect to this body in particular, what the public property is with reſpect to the whole nation. As the nation may be conſidered as a great community, we may indifferently call *things in common*, thoſe that belong to it in common, in ſuch a manner that all the citizens may make uſe of them, and thoſe that are poſſeſſed in the ſame manner by a body or community. the ſame rules take place with reſpect to each. In ſhort, the goods poſſeſſed by individuals are termed *private property*, *res ſingulorum*.

§ 236. Two ways of acquiring public property.

When a nation, in a body, takes poſſeſſion of a country; every thing that is not divided among its members remains common to the whole nation, and is called *public wealth*. There is a ſecond way whereby a nation, and in general, every community may acquire wealth, by the will of whoſoever thinks proper to convey to it, under any title whatſoever, the domain or the property of what he poſſeſſes.

§ 237. The revenues of the public property are naturally at the ſovereign's diſpoſal.

As ſoon as the nation commits the reins of government into the hands of a prince, it is conſidered as committing to him, at the ſame time, the means of governing. Since then the revenues produced by the public property, the domain of the ſtate, is deſtined for the ſupport of government; it is naturally at the prince's diſpoſal, and ought always to be conſidered in this light, unleſs the nation has, in expreſs terms, excepted it in conferring the ſupreme authority, and has provided in any other manner for the neceſſary expences of the ſtate, and the ſupport of the prince's perſon and houſehold. Whenever then the ſovereign authority is referred merely and ſimply to the prince, it includes along with it the power of diſpoſing freely of the public revenues. The duty of the ſovereign ſtrictly obliges him to apply theſe revenues only to the neceſſities of

the ſtate; but he alone is to determine the proper application of them, and ought not to be accountable for them to any perſon.

§ 238. The nation may grant him the uſe and property of the common goods.

The nation may inveſt the ſuperior with the ſole uſe of its common goods, and thus add it to the domain of the ſtate. It may even cede the property of them to him. But this ceſſion of the uſe or property requires an expreſs act of the proprietor, which is the nation. It is difficult to found it on a tacit conſent, becauſe fear too often hinders ſubjects from exclaiming againſt the unjuſt enterpriſes of the ſovereign.

§ 239. It may allow him the domain and reſerve the uſe of it.

The people may even allow the ſuperior the domain of the things he poſſeſſes in common, and reſerve to itſelf the uſe of them in the whole or in part. Thus the domain of a river may be ceded to the prince while the people reſerve the uſe of it for navigation, fiſhing, the watering of cattle, &c. They may alſo allow the prince the ſole right of fiſhing, &c. in a river. In a word, the people may cede to the ſuperior what right they pleaſe with reſpect to the common goods of the nation; but all theſe rights do not naturally and of themſelves flow from the ſovereignty.

§ 240. Of taxes.

If the revenues produced by the public goods, or the domain, are not ſufficient for the public wants, the ſtate may ſupply the deficiency by taxes. Theſe ought to be regulated in ſuch a manner, that all the citizens may pay their quota in proportion to their abilities; and the advantages they reap from the ſociety. All the members of the civil ſociety being equally obliged to contribute, according to their abilities, to its advantage and ſafety; they cannot refuſe to furniſh the ſubſidies neceſſary to its preſervation, when they are exacted by a lawful power.

§ 241. The nation may reſerve to itſelf the right of eſtabliſhing them.

Many nations have been unwilling to commit to the prince a truſt of ſo delicate a nature, and to grant him a power that he may ſo eaſily abuſe. In eſtabliſhing a domain for the ſupport of the ſovereign and the ordinary expences of the ſtate, they have reſerved to themſelves the

right

right of providing, by themſelves, or by their repreſentatives, for extraordinary wants, in impoſing taxes payable by all the inhabitants. In England, the king lays the neceſſities of the ſtate before the parliament; that repreſentative body of the nation deliberates, and with the concurrence of the king, appoints the ſum to be raiſed, and the manner of raiſing it. And to this body the prince gives an account of the uſe he makes of it.

§ 242. Of the ſovereign who has this power.

In other ſtates where the ſovereign poſſeſſes the full and abſolute authority, he alone eſtabliſhes the taxes, regulates the manner of raiſing them, and makes uſe of them as he thinks proper, without giving an account to any body. The French king at preſent enjoys this authority, with the mere form of cauſing his edicts to be confirmed in parliament: but that body has a right to make humble remonſtrances, if any inconveniences are found in the impoſition ordered by the prince: a very wiſe eſtabliſhment for cauſing truth and the cries of the people to reach the ears of the ſovereign, and for ſetting ſome bounds to his diſſipation, or the avidity of the miniſters and perſons concerned in the revenue.

§ 243. The duties of the prince with reſpect to taxes.

The prince who is inveſted with the power of taxing his people, ought to take care of conſidering the money he raiſes as his own property. He ought never to loſe ſight of the end for which this power was granted him: the nation was willing to enable him to provide, as it ſhould ſeem beſt to his wiſdom, for the neceſſities of the ſtate. If he diverts the money to other uſes; if he conſumes it in idle luxury, to gratify his pleaſures, to ſatiate the avarice of his miſtreſſes and favourites; we dare to tell thoſe ſovereigns who are ſtill capable of hearing truth, that ſuch a one is not leſs guilty, nay, that he is a thouſand times more ſo than a private perſon who makes uſe of another perſon's fortune to gratify his irregular paſſions. Injuſtice is not the leſs ſhameful for being above puniſhment.

Every

§ 244. Of the *eminent domain* affixed to ſovereignty.

Every thing in the political ſociety ought to tend to the good of the community; and if even the citizen's perſon is ſubject to this rule, their fortunes cannot be excepted. The ſtate cannot ſubſiſt, or conſtantly adminiſter public affairs in the moſt advantageous manner, if it has not the power of diſpoſing, on occaſion, of all kinds of goods ſubject to its authority. It may even be preſumed, that when the nation takes poſſeſſion of a country, the property of certain things is allowed to individuals only with this reſerve. The right which belonged to the ſociety or to the ſovereign of diſpoſing, in caſe of neceſſity and for the public ſafety, of all the wealth contained in the ſtate is called the *eminent domain*. It is evident that this right is, in certain caſes, neceſſary to him who governs, and conſequently is a part of the empire or ſovereign power, and ought to be placed in the number of the prerogatives of majeſty (§ 45.) When therefore the people ſubmit the empire to any one, it at the ſame time yields to him the *eminent domain*, at leaſt if it is not expreſsly reſerved. Every prince who is truly a ſovereign, is inveſted with this right, in ſuch a manner that his authority is limited in other reſpects.

If the nation diſpoſes of the *public property* in virtue of his eminent domain, the alienation is valid, as having been made with a ſufficient power.

When he diſpoſes in like manner, in a caſe of neceſſity, of the poſſeſſions of a community, or an individual; the alienation will be valid, for the ſame reaſon. But juſtice demands that this community, or this individual, be recompenſed out of the public money: and if the treaſury is not able to pay it, all the citizens are obliged to contribute to it; for the expences of the ſtate ought to be ſupported equally, or in a juſt proportion. It is in this as in the throwing of merchandiſe overboard to ſave the veſſel.

§ 245. Of the government with reſpect to public property.

Beſides the *eminent domain* the ſovereignty gives a right of another nature over all public, common and private goods;

goods; that is the empire, or the right of command in all the places of the country belonging to the nation. The ſupreme power extends to every thing that paſſes in the ſtate, wherever it is tranſacted, and conſequently the ſovereign commands in all public places, on rivers, high-ways, deſerts, &c. Every thing that happens there is ſubject to his authority.

§ 246. The ſuperior may make laws with reſpect to the uſe of things poſſeſſed in common.

In virtue of the ſame authority, the ſovereign may make laws regulating the manner in which common goods are to be uſed, as well thoſe of the entire nation, as thoſe of diſtinct bodies or communities. He cannot, indeed, deprive thoſe of their right who have a ſhare in theſe goods, but the care he ought to take of the public repoſe, and the common advantage of the citizens, gives him doubtleſs a right to eſtabliſh laws tending to this end, and conſequently to regulate the manner in which things poſſeſſed in common ought to be enjoyed. This affair may give room for abuſe, and excite troubles, which it concerns the ſtate to prevent, and againſt which the prince is obliged to take juſt meaſures. Thus the ſovereign may eſtabliſh wiſe laws with reſpect to hunting and fiſhing; forbid them in the ſeaſons of propogation; prohibit the uſe of certain nets, and of every deſtructive method, &c. But as the ſovereign has a right to make theſe laws only in the character of the common father, governor, and tutor of his people, he ought never to forget the end which called him to it, and if he in this reſpect makes laws with any other view than that of the public welfare, he abuſes his power.

§ 247. Of the alienation of the goods of a community.

A community, as well as every proprietor, has the right of alienating and mortgaging its property, but the preſent members have never a right to loſe ſight of the deſign of theſe common goods, nor to diſpoſe of them otherwiſe than for the advantage of the body, or in caſes of neceſſity. If they alienate them with any other view, they abuſe their power, and ſin againſt their duty to the community, and their poſterity; and the prince in quality of common father,

ther, has a right to oppoſe them. Beſides, the intereſt of the ſtate demands that the property of the community be not diſſipated; which gives the prince, intruſted with the care of watching over the public ſafety, a new right to hinder the alienation of this property. It is then very proper to ordain in a ſtate, that the alienation of the property of communities ſhould be invalid, without the conſent of the prince. Thus the civil law, in this reſpect, gives to communities the rights of minors. But this is ſtrictly no more than a civil law; and the opinion of thoſe, who in the law of nature, take from a community the power of alienating their property without the conſent of the ſovereign, appears to me to be void of foundation, and contrary to the notion of property. It is true that a community may have received property either from their predeceſſors, or from any other perſons, with a clauſe that diſables them from alienating it: but in this caſe it is only a perpetual uſufructuary, and not an entire and free property. If any of their property was ſolely given for the preſervation of the body; it is evident that the community has not a right to alienate it, except in a caſe of extreme neceſſity.

§ 248. Of the uſe of common property.

All the members of a community have an equal right to the uſe of their common property. But the body of the community may make ſuch regulations on the manner of enjoying it as they think proper, provided that theſe regulations are not inconſiſtent with that equality which ought to be preſerved in a community of property. Thus a community may determine the cuſtoms of a common foreſt or paſture, either in allowing it to all the members according to their wants, or in fixing an equal proportion for each; but they have not a right to exclude any one, or to diſtinguiſh him by aſſigning him a leſs ſhare than that of the others.

§ 249. The manner in which each ought to enjoy it.

All the members of a body having an equal right to their common property, each ought to have the profit of it in a manner

manner that does not injure in any manner the common use. According to this rule, an individual is not permitted to form upon any river that is a public benefit, any work that is capable of rendering it less proper for the use of every one else, as erecting mills, making a trench to turn the water from its bed, &c. If he attempts it, he arrogates to himself a particular right, contrary to the common right of all.

§ 250. Of the right of prevention in their use.

The right of *prevention (jus præventionis)* ought to be faithfully observed in the use of common things that cannot serve at the same time for many. By this term we understand the right of him who first comes to the use of this sort of things. For example, if I actually draw water from a common or public well, another who comes after cannot drive me away to draw out of it himself, and he ought to stay till I have done. For I make use of my right in drawing that water, and nobody can disturb me: a second, who has an equal right, cannot make use of it to the prejudice of mine; to make me have done, by his arrival, would be to attribute to himself a greater right than me, and thereby to offend against the law of equality.

§ 251. Of the same right in other cases.

The same rule ought to be observed in regard to those common things that are consumed in using, and a second, who comes after, has no right to take them from him. I repair to a common forest, and begin to fell a tree: you come and insist upon having the same tree: you cannot take it from me; for this would be to arrogate to yourself a right superior to mine, though our rights are equal. This rule the law of nature prescribed in the use of the productions of the earth, before the introduction of property.

§ 252. Of the preservation and reparation of things in common.

The expences necessary for the preservation or reparation of the things that belong to the public, or to a community ought to be equally supported by all who have a share in them, whether the money be drawn from a common chest, or whether each individual contributes his quota. The nation, the community, and any collective body

body in general may alſo eſtabliſh extraordinary taxes, impoſts, or annual contributions to defray theſe expences; provided that they are attended with no vexations, and that the money exacted be faithfully applied to the uſe for which it was raiſed. To this end alſo, as we have obſerved (§ 103.), the rights of toll are lawfully eſtabliſhed. Highways, bridges, and cauſeways are things of a public nature, from which all who paſs over them receive advantage: it is therefore juſt that all theſe paſſengers contribute to their ſupport.

§ 253. The duty and right of a ſovereign in this reſpect.

We ſhall ſee preſently that the ſovereign ought to provide for the preſervation of things of a public nature. He is not leſs obliged, as the conductor of the whole nation, to watch over the property of a community. It is for the intereſt of every ſtate that a community does not fall into indigence, by the ill conduct of thoſe who actually compoſe it. And as the obligation produces the right, without which it cannot be diſcharged, the ſovereign has here a right to oblige the community to conform to their duty. If then he perceives, for example, that they ſuffer the neceſſary buildings to fall to ruin, or that they deſtroy the foreſts, he has a right to preſcribe what they ought to do, and to put his orders in force.

§ 254. Of private property.

We have only one word to ſay, with reſpect to private property: every proprietor has a right to make what uſe he pleaſes of his own ſubſtance, and to diſpoſe of it in ſuch a manner as he pleaſes, when the property of a third perſon is not injured by it. However, the ſovereign, as the father of his people, may, and ought to ſet bounds to a prodigal, and to prevent his running to ruin, eſpecially if this prodigal is the father of a family. But he muſt take care not to extend this right of inſpection ſo far as to offer reſtraint to his ſubjects in the adminiſtration of their affairs, which would be of no leſs injury to the true welfare of the ſtate, than to the juſt liberty of the citizens. The particulars of this ſubject belong to the public law and to politics.

It

§ 255. The ſovereign may ſubmit them to political laws.

It muſt alſo be obſerved, that individuals are not ſo free in the economy or government of their affairs as not to be ſubject to the regulations of polity, made by the ſovereign. For inſtance, if vines are greatly multiplied in a country, which is in want of corn, the ſovereign may forbid the planting of the vine, in fields proper for tillage, for here the public welfare and the ſafety of the ſtate are concerned. When a reaſon of ſuch importance requires it, the ſovereign, or the magiſtrate, may oblige an individual to ſell all the proviſions that are more than ſufficient for the ſubſiſtence of his family, and fix the price. The public authority may and ought to hinder monopolies, and ſuppreſs all practices tending to raiſe the price of proviſions; this the Romans called *annonam incendere, comprimere, vexare.*

§ 256. Of inheritances.

Every man may naturally chooſe the perſon to whom he would leave his wealth after his death, as long as his right is not limited by an indiſpenſable obligation; as for inſtance, that of providing for the ſubſiſtence of his children. Theſe children have alſo naturally the right of ſucceeding in an equal proportion to the property of their father. But this is no reaſon why particular laws may not be eſtabliſhed in a ſtate, with reſpect to teſtaments and inheritances; a reſpect being always paid to the eſſential laws of nature. Thus to ſupport noble families, it is a law eſtabliſhed in many places, that the eldeſt has the right of being the principal heir to his father. Lands perpetually appropriated to the eldeſt of a family belong to him, in virtue of another right, which has its ſource in the will of him, who being the poſſeſſor of theſe lands has bequeathed them in that manner.

CHAP.

CHAP. XXI.

Of the Alienation of the public Property, or the Domain and that of a Part of the State.

§ 257. The nation may alienate its public property.

THE nation being the ſole miſtreſs of the property i its poſſeſſion may diſpoſe of it, as ſhe thinks pr per, alienate it, or lawfully mortgage it. This right is neceſſary conſequence of the full and abſolute domain the exerciſe of it is reſtrained by the law of nature, on with reſpect to proprietors who have not the uſe of th reaſon neceſſary for the management of their affairs, whic is not the caſe of a nation. Thoſe who think otherwi cannot alledge any ſolid reaſon for their opinion; and follows from their principles, that no ſafe contract can b entered into with any nation: which attacks the found tion of all public treaties.

§ 258. The duties of a nation in this reſpect.

But it is very juſt to ſay, that the nation ought to pr ſerve its public property with great care to make a prop uſe of it, and not to diſpoſe of it but for good reaſons, n to alienate or mortgage it but for its manifeſt advantag or in caſe of a preſſing neceſſity. This is an evident co ſequence of ths duties a nation owes to itſelf. The publ property is of great uſe, and even neceſſary, and it canno diſſipate it improperly, without manifeſtly hurting and in juring itſelf. I ſpeak of the public property ſtrictly called, or the domain of the ſtate. Alienating its revenu is cutting the nerves of government. As to the proper common to all the citizens, the nation does an injury t thoſe who receive advantage from it, if it alienates it with out neceſſity, or without good reaſon. It has a right t do this as proprietor of theſe poſſeſſions; but it ought t do it only in ſuch a manner as is agreeable to the duti of the body towards its members.

§ 259. Thoſe of the prince.

Theſe duties relate to the prince, the director of th nation: he ought to watch over its preſervation and th wi

wiſe adminiſtration of the public property, to ſtop and prevent its diſſipation, and not to ſuffer its being diverted to foreign uſes.

§ 260. He cannot alienate the public property.

The prince, or the ſuperior of the ſociety, whatever he is, being naturally no more than the adminiſtrator, and not the proprietor of the ſtate, his authority as ſovereign, or head of the nation, does not of itſelf give him a right to alienate or diſpoſe of the public property. The general rule then is, that the ſuperior cannot diſpoſe of the public property, as to its ſubſtance. If the ſuperior makes uſe of this property, the alienation he makes of it will be invalid, and may at any time be revoked by his ſucceſſor, or by the nation. This is the law commonly received in France; and it was upon this principle that the Duke of Sully[b] adviſed Henry IV. to reſume the poſſeſſion of all the domains of the crown alienated by his predeceſſors.

§ 261. The nation may give him the right of doing it.

The nation having the free diſpoſal of all the property belonging to it (§ 257.); it may convey this right to the ſovereign, and conſequently confer upon him that of alienating, and mortgaging the public property. But this right not neceſſarily belonging to the conductor of the ſtate, to enable him to render the people happy by his government; it is not to be preſumed, that the nation has given it him; and if it has not made an expreſs law for that purpoſe, it ought to be maintained that the prince is not inveſted with it.

§ 262. The rules on this ſubject with reſpect to treaties between nation and nation.

The rules we have juſt eſtabliſhed relate to alienations of public property made in favour of individuals. The queſtion is altered when it relates to alienations made by one nation to another[c]: it requires other principles to decide it in the different caſes that may preſent themſelves. Let us endeavour to give a general theory of them.

[b] See his Memoirs.

[c] Quod domania regnorum inalienabilia & ſemper revocabilia dicuntur, reſpectu privatorum intelligitur, nam contra alias gentes divino privilegio opus foret. *Leibnitius, Præfat. ad Codic. Jur. Gent. Diplomat.*

1. It is neceſſary that nations ſhould treat and tranſact their affairs with validity, without which they could have no method of terminating them, and of placing themſelves in a ſtate of tranquillity. Whence it follows, that when a nation has ceded any part of its property to another, the ceſſion ought to be held as valid and irrevocable, as it is done in virtue of the notion of *property*. This principle cannot be ſhaken by any fundamental law, by means of which a nation might pretend to deprive itſelf of the power of alienating what belonged to itſelf. For this would be to forbid all contracts with other nations, or to pretend to deceive them. A nation with ſuch a law ought never to treat of its property: if it is obliged to it by neceſſity, or determined to do it for its own advantage, it muſt renounce its fundamental law. It is ſeldom diſputed that an entire nation may alienate what belongs to itſelf: but it is aſked, if its conductor, if its ſovereign, has this power? The queſtion may be determined by the fundamental laws. If the laws ſay nothing directly on this ſubject, this will be explained in our ſecond principle.

2. If the nation has conferred the full ſovereignty on its conductor, if it has committed the care of it to him, and has, without reſerve, given him the right of treating and contracting with other ſtates, it is conſidered as having inveſted him with all the power neceſſary to make a valid contract. The prince is then the organ of the nation; what he does is reputed done by itſelf, and though he is not the proprietor of the public property, his alienations are valid, as being duly authoriſed.

§ 263. Of the alienation of a part of the ſtate.

The queſtion becomes more difficult, when it relates, not to the alienation of ſome parts of the public property, but to the diſmembering of the nation or ſtate itſelf, the ceſſion of a town or a province, that compoſes a part of it. This muſt ever reſult from invariable principles. A nation ought to preſerve itſelf (§ 16.), it ought to preſerve all its members, it cannot abandon them, and it is under an obligation

obligation to them of maintaining them in the rank of members of the nation (§ 17.) It has not then a right to traffic with their rank and liberty, on account of any advantages it may promiſe itſelf from ſuch a negotiation. They are united to the ſociety to be its members; they acknowledge the authority of the ſtate, to promote in concert their common welfare and ſafety, and not to be at its diſpoſal, like a farm or an herd of cattle. But the nation may lawfully abandon them in a caſe of extreme neceſſity, and it has a right to cut them off from the body, if the public ſafety requires it. When therefore in ſuch a caſe, the ſtate abandons a city or a province, to a neighbour, or to a powerful enemy; the ceſſion ought to remain valid as to the ſtate, ſince it has a right to make it: it could take no other method; it has yielded all the other rights it could have over it.

§ 264. The right of thoſe diſmembered.

But this province, or this city, thus abandoned and diſmembered from the ſtate, is not obliged to receive the new maſter attempted to be given them: the people being ſeparated from the ſociety of which they were members, they reſume all their rights, and if it be poſſible for them to defend their liberty againſt him who would ſubject them to his authority, they may lawfully reſiſt him. Francis I. having engaged by the treaty of Madrid to cede the duchy of Burgundy to the emperor Charles V. the ſtates of that province declared "that having never been "ſubject to any other crown but that of France, they "would die ſubject to it; and that if the king abandoned "them, they would take up arms, and endeavour to ſet "themſelves at liberty, rather than ſubmit to another "power [d]." It is true, ſubjects are ſeldom in a ſituation to make reſiſtance, on theſe occaſions, and commonly the beſt part they are able to take is, to ſubmit to their new maſter, by obtaining as good conditions as poſſible.

[d] *Mezeray's Hiſtory of France, Tom. II. page 458.*

The

§ 265. Whether the prince has power to diſmember the ſtate.

The prince, the ſuperior of whatever kind, has he the power to diſmember the ſtate? Let us anſwer as we have done above with reſpect to the domain: if the fundamental laws forbid the diſmembering, he cannot do it without the concurrence of the nation or its repreſentatives. But if the laws are ſilent, and if the prince has received a full and abſolute authority, he is then the depoſitory of the rights of the nation, and the organ by which it declares its will. The nation ought never to abandon its members but in a caſe of neceſſity, or with a view to the public ſafety, and to preſerve itſelf from total ruin: and the prince ought only to cede them for the ſame reaſons. But ſince he has received an abſolute authority, he is to judge of the neceſſity of the caſe, and what the ſafety of the ſtate requires.

On occaſion of the treaty of Madrid, juſt mentioned, the principal perſons in France aſſembled at Cognac, after the king's return, unanimouſly concluded, "that his au-"thority did not extend ſo far as to diſmember the crown;" and the treaty was declared void as contrary to the fundamental law of the kingdom. Indeed it was done without ſufficient power; the law in expreſs terms refuſing the king the right of diſmembering the kingdom: the concurrence of the nation was neceſſary for this purpoſe, and it might give its conſent by the medium of the ſtates-general. Charles V. ought not to have releaſed his priſoner before thoſe very ſtates had approved the treaty; or rather, making a more generous uſe of his victory, he ſhould have impoſed leſs rigorous conditions, ſuch as it was in the power of Francis I. to grant, and with which he could not have refuſed to comply without ſhame. But at preſent when the ſtates-general do not aſſemble in France, the king remains the ſole organ of the ſtate, with reſpect to other powers: they have a right to take his will for that of all France, and the ceſſions the king might make them, would remain valid, in virtue of the tacit conſent by which the nation has ſubmitted all power into the

the hands of the King with reſpect to treaties. Were it otherwiſe no certain treaty could be entered into with the crown of France. However, by way of precaution, other powers have often demanded that their treaties ſhould be regiſtered in the parliament of Paris: but at preſent this formality ſeems to be laid aſide.

CHAP. XXII.

Of Rivers, Streams and Lakes.

§ 266. Of a river that ſeparates two territories.

WHEN a nation takes poſſeſſion of a country, in order to ſettle there, it poſſeſſes every thing included in it, as lands, lakes, rivers, &c. But it may happen, that the country is terminated and ſeparated from another by a river, in which caſe, it is aſked, to whom this river belongs? It is manifeſt from the principles eſtabliſhed in Chap. XVIII. that it ought to belong to the nation who firſt took poſſeſſion of it. This principle cannot be denied; but the difficulty is, to make the application. It is not eaſy to determine which of the two neighbouring nations was the firſt who took poſſeſſion of a river that ſeparates them. Theſe are the rules which the principles of the law of nations furniſh for deciding theſe queſtions.

1. When a nation takes poſſeſſion of a country terminated by a river, it is conſidered as alſo appropriating the river to itſelf; for a river is of ſuch great uſe, that it is to be preſumed the nation intended to reſerve it to itſelf. Conſequently, the nation who firſt eſtabliſhed its dominion on one of the banks of the river, is conſidered as being the firſt poſſeſſor of all that part of the river which terminates its territory. This preſumption is indubitable, when it relates to a river that is extremely large, at leaſt for a

part of its length; and the ſtrength of the preſumption increaſes or diminiſhes in an *inverſe ratio* with the largeneſs of the river; for the more the river is confined, the more does the ſafety and convenience of its uſe require that it ſhould be ſubject entirely to the empire and property of that nation.

2. If this nation has made any uſe of the river, as for navigation or fiſhing, it is preſumed with the greater certainty, that it has reſolved to appropriate the river to itſelf.

3. If neither the one or the other of the two nations near the river can prove that it ſettled firſt in thoſe countries, it is to be ſuppoſed that they both came there at the ſame time, ſince neither of them can give any reaſon of preference: and in this caſe, the dominion of each will extend to the middle of the river.

4. A long and undiſputed poſſeſſion eſtabliſhes the right of nations, otherwiſe there could be no peace, nor any thing ſtable amongſt them, and remarkable facts ought to prove the poſſeſſion. Thus when from time immemorial, a nation has, without contradiction exerciſed the ſovereignty upon a river, which ſerves for its limits, nobody can diſpute with that nation the ſupreme dominion.

5. If treaties determine any thing on this queſtion they muſt be obſerved. The deciſion by conventions, being very expreſs, are ſafeſt; and this is, in fact, the method taken by moſt powers at preſent.

§ 267. Of the bed of a river which is dried up on its taking another courſe

If a river leaves its bed, whether it be dried up or whether it takes its courſe elſewhere, the bed belongs to the maſter of the river; for the bed made a part of the river, and he who had appropriated to himſelf the whole, had neceſſarily appropriated to himſelf the parts.

§ 268. Of the right of alluvion.

If the country which borders on a river has no other limits than the river itſelf, it is in the number of territories that have natural or indetermined limits (*territoria arciſmia*), and it enjoys the right of *alluvion*; that is the increaſe of land,

land, which the courſe of the river may form by little and little; theſe additions of territory, in following nature, belong to the ſame maſter. For if I take poſſeſſion of a territory, declaring that I will have it limited by the river which waſhes it, or if it is given me upon this footing, I by this means poſſeſs beforehand the right of *alluvion*, and conſequently, I alone may appropriate to myſelf the right of all which the current of the river ſhall inſenſibly add to my territory. I ſay *inſenſibly*, becauſe in the uncommon caſes named *avulſion*, when the violence of the ſtream ſeparates a conſiderable piece of land and joins it to another, ſo that it may be known again, this piece of land naturally belongs to its firſt maſter. The civil law has thus provided againſt and decided this caſe when it happens between individual and individual: it ought to unite equity with the welfare of the ſtate, and the care of preventing litigations.

In caſe of doubt, every country lying upon a river is preſumed to have no other limits but the river itſelf; becauſe nothing is more natural than to take a river for a boundary, when a ſtate is eſtabliſhed on its borders; and wherever there is a doubt, that is always to be preſumed, which is moſt natural and moſt probable.

§ 269. If the alluvion produces any change with reſpect to the rights on a river.

As ſoon as it is eſtabliſhed that a river ſeparates two territories, whether it remains common to the inhabitants on each of its banks, or whether each ſhares half of it; or whether, in ſhort, it belongs entirely to one of them; their rights with reſpect to the river are no ways changed by the alluvion. If it happens then that by a natural effect of the current, one of the two territories receives an increaſe, while the river gains by little and little on the oppoſite bank; the river remains the natural boundary of the two territories, and each preſerves the ſame rights upon it notwithſtanding its gradually changing its bed; ſo that, for inſtance, if it be divided in the middle, between the perſons on each bank, that middle, though it changes its place, will continue to be the line of ſeparation between the two

neighbours. The one loſes, 'tis true, while the other gains; but nature alone produces this change: it deſtroys the land of the one, while it forms freſh land for the other. This can be no otherwiſe determined, ſince they have taken the river alone for their limits.

§ 270. What is the caſe when the river changes its bed.

But if inſtead of its being gradually, and progreſſively diſplaced, the river, by an accident merely natural, turns entirely out of its courſe, and runs into one of the two neighbouring ſtates, the bed it abandons muſt ſerve for the boundary; and it belongs to the maſter of the river (§ 267.): the river is loſt in all that part of it, while it runs in its new bed, and there belongs only to the ſtate in which it flows.

This caſe is very different from that of a river which changes its courſe, without going out of the ſame ſtate. This continues, in its new courſe, to belong to the ſame maſter, either the ſtate, or to him to whom the ſtate has given it; becauſe the river belongs to the public, in whatever part of the country it flows, the bed being abandoned, half of it is added on each ſide to the contiguous lands, if they are *arciſinies*, that is, natural limits with a right of alluvion. This bed does not belong to the public, notwithſtanding what we have ſaid in § 267; on account of the right of alluvion poſſeſſed by its neighbours, and becauſe here the public poſſeſſed that ſpace only becauſe the river flowed in it, but it belongs to the public if the adjacent lands are not *arciſinies*. The new ſoil over which the river takes its courſe is loſt to the proprietor, becauſe all the rivers in the country belong to the public.

§ 271. Of works tending to turn the current.

It is not allowable to raiſe works on a bank of the water tending to turn its courſe, and to caſt it upon the oppoſite bank, this would be to gain, by the prejudice of another. Each can only ſecure himſelf, and hinder the current from undermining, and carrying away his lands.

§ 272. Or in general prejudicial to the rights of others.

In general no perſon ought to build on a river, any more than elſewhere, any work that is prejudicial to the right of

of another. If a river belongs to a nation, and another has inconteſtably a right of navigation upon it; the firſt cannot form a dam or mill that ſhall put a ſtop to its being navigable: its right, in this caſe, is only that of a limited property, and it cannot exert it but by reſpecting the rights of others.

§ 273. The rules in relation to two oppoſite rights.

But when two different rights with reſpect to the ſame thing are found in oppoſition, it is not eaſy to determine which ought to yield to the other: no one can ſucceed in this without attentively conſidering the nature of the rights and their origin. For example, a river belongs to me, but you have a right to fiſh in it: may I conſtruct on my river mills that will render fiſhing more difficult and leſs advantageous? The affirmative ſeems to follow the nature of our rights, I, as proprietor, have an eſſential right in the thing itſelf; you have none but a right of uſe, acceſſary and dependant on mine; you have only in general the right of fiſhing, as you can, in my river, ſuch as it ſhall be, and in ſuch a ſtate as will be ſuitable to me to poſſeſs it. I do not take away your right by erecting my mills; it ſubſiſts in the general view of it, and if it becomes leſs uſeful to you, it is by accident and becauſe it is dependant on the exerciſe of mine.

It is not thus with the right of navigation, of which we are going to treat. This right neceſſarily ſuppoſes, that the river ſhall remain free and navigable. And therefore, muſt exclude every work that will entirely interrupt its navigation.

The antiquity and origin of rights ſerve no leſs than their nature, to determine the queſtion. The moſt ancient right is abſolute, and to be exerted in its full extent, and the other only ſo far as it may be extended without prejudice to the firſt; for it could only be eſtabliſhed on this footing, unleſs the poſſeſſor of the firſt right has expreſsly conſented to its being limited.

In the ſame manner rights ceded by the proprietor are conſidered as ceded without prejudice to the other rights that

that belong to him, and only ſo far as they may agree with them; unleſs an expreſs declaration, on the very nature of the right, determine it otherwiſe. If I have ceded to another the right of fiſhing in my river, it is manifeſt that I have ceded it without prejudice to my other rights, and that I remain free to build on that river ſuch works as I think proper, though they ſhould even injure the fiſhery, provided they do not deſtroy it entirely. A work of this laſt kind, ſuch as a dam that would hinder the fiſh from aſcending it, could not be built but in a caſe of neceſſity, and according to circumſtances recompenſing him who has a right of fiſhing.

§ 274. Of lakes.

What we have ſaid of ſtreams and rivers, may be eaſily applied to lakes. Every lake intirely included in a country, belongs to the nation who is the proprietor of that country, which in poſſeſſing a territory is conſidered as having appropriated to itſelf every thing included in it; and as it ſeldom happens that the property of a lake of any conſiderable bigneſs falls to the ſhare of individuals, it remains common to the nation. If this lake is ſituated between two ſtates, it is preſumed to be divided between them at the middle, while there is no title, no conſtant and manifeſt cuſtom to determine otherwiſe.

§ 275. Of the increaſe of a lake.

What has been ſaid of the right of alluvion, in ſpeaking of rivers, ought alſo to extend to lakes. When a lake, which terminates a ſtate, belongs intirely to it, the increaſe of the lake follows the poſſeſſion of every thing elſe; but it is neceſſary that the increaſe ſhould be inſenſible, as that of land in alluvion, and that the increaſe ſhould be real, conſtant and compleat; to explain myſelf: 1. I ſpeak of inſenſible increaſe, this is the reverſe of alluvion; the inquiry here is the increaſe of the lake, and in the other caſe that of the land. If this increaſe be not inſenſible; if the lake by breaking down its banks, ſuddenly overflows a large country, this new portion of the lake, this country covered with water, ſtill belongs to its ancient maſter. Upon what can they found the acquiſition in behalf of the maſter of the lake? The ſpace is very eaſily known again, though

though it has changed its nature, and too considerable for any one to presume, that the master had no intention to preserve it, notwithstanding the change that might happen.

But 2. If the lake insensibly undermines a part of the opposite territory, destroys it, and renders it impossible to be known, by establishing itself there and adding it to its bed, that part of the territory perishes with respect to its master, and no longer exists, and the whole of the lake thus increased still belongs to the same state as before.

3. If some of the lands bordering on the lake, are only overflowed at high water, this transient accident, cannot produce any change in their dependance. The reason why the soil, which the lake invades by little and little, belongs to the master of the lake, and perishes with respect to the ancient proprietor, is because the proprietor has no other limits besides the lake, nor any other marks besides its bank, to ascertain how far this possession extends. If the water advances insensibly he loses, if it retires in like manner he gains: such must have been the intention of the people who have respectively appropriated the lake and the neighbouring territories to each other; it can scarcely be supposed, that they had any other intention. But a territory overflowed for a time, is not confounded with the rest of the lake; it is still to be known, and the master may preserve his right, as proprietor. Were it otherwise, a town overflowed by a lake would change its government during the inundation, and return to its ancient master as soon as the waters were dried up.

4. For the same reason, if the waters of the lake penetrating by an opening into the neighbouring country, there form a bay, or new lake, joined to the first by a canal; this new mass of water, and the canal, belong to the master of the county in which they are formed. For the limits are easily known; and it cannot be presumed that he had any intention to abandon so considerable a space when it

it happened to be invaded by the waters of the neighbouring lake.

It must here be observed that in these questions, we are treating of the affair between state and state: it is to be decided by other principles when it relates to the proprietors, who are members of one and the same state. Here it is not merely the limits of the soil which determine the possession of it; it is also its nature, and use. An individual who possesses a field on the borders of a lake, cannot enjoy it as a field when it is overflown; he who has, for example, the right of fishing in the lake, may exert this right in this new extent: if the waters retire, the field is restored to the use of its master. If the lake penetrates by an opening into the low lands in its neighbourhood, and lays them constatly under water, this new lake belongs to the public, because all the lakes belong to the public.

§ 276. Land formed on the banks of a lake.

The same principles shew, that if the lake insensibly forms an accession of land on its banks, either by retiring or in any other manner, this increase of land belongs to the country to which it is joined when that country has no other limits but the lake. This is the same as the alluvion on the banks of a river.

§ 277. Of the bed of a lake dried up.

But if the lake happen to be suddenly dried up, either totally, or in a great part of it, the bed remains in the possession of the sovereign of the lake; the nature of the soil, so easily known, sufficiently marking out the limits.

§ 278. Of the jurisdiction over lakes and rivers.

The empire, and jurisdiction over lakes and rivers, is subject to the same rules as property, in all the cases in which we have examined it. Each state has naturally a dominion over part or over the whole. We have seen (§ 245.) that the nation, or its sovereign, commands in all places in his possession.

CHAP.

CHAP. XXIII.

Of the Sea.

§ 279. Of the ſea and its uſe.

IN order to complete the expoſition of the principles of the law of nations, in regard to the things a nation may poſſeſs, it remains to treat of the ſea. The uſe of the open ſea conſiſts in navigation, and in fiſhing; along its coaſts it is moreover of uſe for the procuring of ſeveral things found near the ſhore, ſuch as ſhell-fiſh, amber, pearls, &c. for making of ſalt, and in ſhort, for the eſtabliſhment of places of retreat and ſecurity for veſſels.

§ 280. If the ſea can be poſſeſſed and its dominion appropriated.

The open ſea is in its own nature not to be poſſeſſed, nobody being able to ſettle there ſo as to hinder others from paſſing. But a nation powerful at ſea may forbid others to fiſh in and to navigate it, declaring that it appropriates its dominion to itſelf, and that it will deſtroy the veſſels that ſhall dare to appear in it, without its permiſſion. Let us ſee whether it has a right to do this.

§ 281. Nobody has a right to appropriate to himſelf the uſe of the open ſea.

It is manifeſt that the uſe of the open ſea, which conſiſts in navigation and fiſhing, is innocent and inexhauſtible; that is, he who navigates, or fiſhes in it, does no injury to any one, and that the ſea, in theſe two reſpects, is ſufficient for all mankind. Now nature does not give to man a right of appropriating to himſelf things that may be innocently uſed and that are inexhauſtible, and ſufficient for all; ſince, every one being able to find in their ſtate of communion what was ſufficient to ſupply their wants, to undertake to render themſelves ſole maſters of them, and exclude all others, would be to deprive them, without reaſon, of the benefits of nature. The earth no longer furniſhing without culture the things neceſſary or uſeful to the human race, who were extremely multiplied, it became convenient

convenient to introduce the right of property, in order that each might apply himself with more success to the cultivation of what fell to his share, and multiply by his labour the several things useful to life. Thus the law of nature approves the rights of dominion and property, which put an end to the primitive manner of living in common. But this reason could not take place with regard to things in themselves inexhaustible, which therefore cannot be justly appropriated. If the free and common use of a thing of this nature was prejudicial or dangerous to a nation, the care of its own safety authorized it to submit, if possible, that thing to its dominion, in order to permit the use of it with such precautions as prudence should direct. But this is not the case with the open sea, in which people may sail and fish without the least prejudice to any persons whatsoever, and without putting any other people in danger. No nation has then a right to lay claim to the open sea, or to attribute the use of it to itself to the exclusion of others. The Kings of Portugal have formerly arrogated to themselves the empire of the seas of Guinea and the East-Indies[a]; but the other maritime powers gave themselves little trouble about such a pretension.

§ 282. The nation that attempts to exclude another, does it an injury.

The right of navigating and fishing in the open sea, being then a right common to all men, the nation who attempts to exclude another from that advantage does it an injury, and gives a sufficient cause for war; nature authorising a nation to repel an injury, that is, to make use of force against whoever would deprive it of its rights.

§ 283. It even does an injury to all nations.

We may moreover say, that a nation, which without a title would arrogate to itself an exclusive right to the sea, and support it by force, does an injury to all nations whose common right it violates; and all are at liberty to unite against it, in order to repress such an attempt. Nations have the greatest interest in causing the law of nations, which is the basis of their tranquillity, to be

[a] See Grotius's *Mare Liberum*, and Selden's *Mare Clausum*, *Lib.* I. *Cap.* XVII.

universally

univerſally reſpected. If any one openly tramples it under foot, all may and ought to raiſe up againſt him; and by uniting their forces, to chaſtiſe the common enemy, they will diſcharge their duty towards themſelves and towards human ſociety, of which they are members (Prelim. § 22.)

§ 284. It may acquire an excluſive right by treaties.

However, as each has the liberty of renouncing its right, a nation may acquire excluſive rights of navigation and fiſhing, by treaties, in which other nations renounce, in its favour, the right they receive from nature. Theſe are obliged to obſerve their treaties, and the nation they have favoured has a right to maintain by force, the poſſeſſion of its advantages. Thus the Houſe of Auſtria has renounced in favour of England and Holland, the right of ſending veſſels from the Netherlands to the Eaſt Indies. We may ſee in *Grotius de Jure Belli & Pacis, Lib.* II. *Cap.* III. § 15. many examples of the like treaties.

§ 285. But not by preſcription and long uſe.

The rights of navigation, fiſhing and others, that may be exerciſed on the ſea, belonging to the right of mere ability *(jura meræ facultatis)* are impreſcriptible (§ 95.); they cannot be loſt for want of uſe. Conſequently, when a nation finds that itſelf alone has from time immemorial been in the poſſeſſion of a navigation or fiſhery in certain ſeas, it cannot, on this foundation, attribute to itſelf an excluſive right to them. For though others have not made uſe of their common right to navigation and fiſhery in thoſe ſeas, it does not follow from thence, that they have had any intention to renounce it, and they have a right to make uſe of it whenever they think proper.

§ 286. If it be not in virtue of a tacit agreement.

But it may happen, that a want of uſe may be attended with the nature of a conſent, or a tacit pact, and thus become a title in favour of one nation againſt another. When a nation in the poſſeſſion of the navigation and fiſhery in certain latitudes pretends an excluſive right, and forbids any other interfering in it; if theſe obey that prohibition with ſufficient marks of acquieſcence, they tacitly renounce.

renounce their right, in favour of the other, and eſtabliſh a right which the other may afterwards lawfully maintain againſt them, eſpecially when it is confirmed by long uſe.

§ 287. The ſea near the coaſt may become a property.

The various uſes of the ſea near its coaſt render it very ſuſceptible of property. People there fiſh, and draw from thence ſhells, pearls, amber, &c. now in all theſe reſpects its uſe is not inexhauſtible; ſo that the nation to whom the coaſts belong may appropriate to itſelf an advantage, which it is conſidered as having taken poſſeſſion of, and made a profit of it, in the ſame manner as it may poſſeſs the domain of the land it inhabits. Who can doubt, that the pearl fiſhery of Bahrem and Ceylon may not lawfully be enjoyed as property? And though a fiſhery for food appears more inexhauſtible, if a nation has a fiſhery on its coaſts that is particularly advantageous, and of which it may become maſter, ſhall it not be permitted to appropriate this natural advantage to itſelf, as a dependance on the country it poſſeſſes; and, if there are a ſufficient number of fiſh to furniſh the neighbouring nations, of reſerving to itſelf the great advantages it may receive from them by commerce? But if ſo far from taking poſſeſſion of it, it has once acknowledged the common right of other nations to come and fiſh there, it can no longer exclude them from it; it has left that fiſhery in its primitive freedom, at leaſt with reſpect to thoſe who have been in poſſeſſion of it. The Engliſh not having taken the advantage from the beginning of the herring fiſhery on their coaſt, it is become common to them with other nations.

§ 288. Other reaſons of appropriating the ſea bordering on the coaſts.

A nation may appropriate things, where the free and common uſe of them would be prejudicial or dangerous. This is a ſecond reaſon for which powers extend their dominion over the ſea along their coaſt, as far as they are able to protect their right. It concerns their ſafety and the welfare of the ſtate, that the whole world be not permitted to come ſo near their poſſeſſion, eſpecially with

men

men of war; as to hinder the approach of trading nations, and disturb navigation. During the war of Spain with the United Provinces, James I. King of England, caused to be drawn along his coast the limits within which he declared that he would not suffer any of the powers at war to pursue their enemies, nor even their armed vessels to stop and observe the ships that should enter or sail out of the ports[a]. These parts of the sea thus subject to a state, are comprehended in its territory; no one can navigate them in spite of that nation. But it cannot refuse access to vessels not suspected, for innocent uses without violating its duty; every proprietor being obliged to grant a passage to strangers, even by land, when it may be done without damage or danger. It is true, that the state itself is to judge of what is proper to be done in every particular case that is prevented, and if it judges amiss it is to blame; but the others ought to bear with it. It is not the same in cases of necessity: as for instance, when a vessel is obliged to enter a road which belongs to you to shelter herself from a tempest, in this case the right of entering every where, and causing no damage, or repairing it, is, as we shall shew more at large, a remainder of the primitive freedom, of which no man was ever able to deprive himself, and a vessel may lawfully enter in spite of you, if you unjustly refuse her.

§ 289. How far this possession may extend.

It is not easy to determine to what distance a nation may extend its rights over the sea by which it is surrounded. Bodinus[b] pretends, that according to the common right of all maritime nations, the prince's dominion extends even thirty leagues from the coast. But this exact determination can only be founded on a general consent of nations, which it would be difficult to prove, each state may, in this respect, ordain what it shall think best, in relation to what concerns the citizens themselves, or their affairs with the sovereign: but between nation and nation all that can

[a] Selden's *Mare Clausum*, Lib. II. [b] In his republic, Book I. Ch. X.

reasonably

reasonably be said, is, that in general the dominion of the state over the neighbouring sea, extends as far as is necessary for its safety, and it can render it respected, since on the one hand, it can only appropriate to itself a thing that is common, as the sea, so far as it has need of it, for some lawful end (§ 281.); and on the other, it would be a vain and ridiculous pretension to claim a right that it was no ways able to cause to be respected. The fleets of England have given room to its kings to attribute to themselves the empire of the seas which surrounds that island, even as far as the opposite coasts[a]: Selden relates a solemn act[b] by which it appears that, that empire in the time of Edward I. was acknowledged by the greatest part of the maritime nations of Europe; and the republic of the United Provinces acknowledged it, in some manner, by the treaty of Breda in 1667, at least so far as related to the honours of the flag. But solidly to establish a right of such extent, it is necessary to shew very clearly the express, or tacit consent of all the powers concerned. The French have never agreed to this pretension of England, and in the same treaty of Breda, we have just mentioned, Louis XIV. would not even suffer the Channel to be called the English Channel or the British Sea. The republic of Venice claims the empire of the Adriatic, and every body knows the ceremony annually performed upon it, on that account. To confirm this right, there have been brought the example of Uladislas, King of Naples, of the Emperor Frederic III. and of some of the Kings of Hungary, who desired of the Venetians the permission to pass through that sea with their vessels[c]. That the empire belongs to the republic to a certain distance from the coast in the places of which it can keep possession, and which it is of importance to hold in regard to its own safety, is what appears to me to be in-

[a] See Selden's *Mare Clausum*. [b] Idid. Lib. II. Cap. XXVIII.
[c] Ibid. Lib. I. Cap. XVI.

contestible:

conteſtible: but I doubt very much whether any power is at preſent diſpoſed to acknowledge her ſovereignty over the whole Adriatic Sea. Theſe pretended empires are reſpected while the nation that lays claim to them is able to ſupport them by force; but they fall with its power. At preſent the whole ſpace of the ſea within cannon-ſhot of the coaſt is conſidered as making a part of the territory, and for that reaſon a veſſel taken under the cannon of a neutral fortreſs is not a good prize.

§ 290. Of banks and ports.

The banks of the ſea belong inconteſtibly to the nation that poſſeſſes the country of which it is a part; and theſe are the number of public things. If the Roman civilians place them in the rank of things common to all the world (*res communes*) it is only in regard to their uſe; and we ought not to conclude from it, that they conſidered them as independent of the empire; the very contrary appears from a great number of laws. The ports and harbours are manifeſtly a dependance, and even a part of the country, and conſequently are the property of the nation. We may apply to them, as to the effects of the domain of the empire, every thing that has been ſaid of the land itſelf.

291. Of bays and ſtraits.

All we have ſaid of the parts of the ſea near the coaſt may be ſaid more particularly, and with much greater reaſon, of the roads, bays, and ſtraits, as ſtill more capable of being occupied, and of greater importance to the ſafety of the country. But I ſpeak of the bays and ſtraits of ſmall extent; and not of thoſe great parts of the ſea to which theſe names are ſometimes given, as Hudſon's Bay and the Straits of Magellan, over which the empire cannot extend, and ſtill leſs a right of property. A bay whoſe entrance may be defended, may be poſſeſſed and rendered ſubject to the laws of the ſovereign, and it is of importance that it ſhould be ſo, ſince the country may be much more eaſily inſulted in ſuch a place, than on the coaſt open to the winds, and the impetuoſity of the waves.

It

§ 292. Of ſtraits in particular.

It muſt be remarked with regard to the ſtraits, that when they ſerve for a communication between two ſeas, the navigation of which is common to all, or to many nations, he who poſſeſſes the ſtrait, cannot refuſe others a paſſage through it, provided that paſſage be innocent, and attended with no danger to the ſtate. Such a refuſal, without juſt reaſon, would deprive theſe nations of an advantage granted them by nature; and indeed, the right of ſuch a paſſage is a remainder of the primitive liberty enjoyed in common. Nothing but the care of his own ſafety can authoriſe the maſter of the ſtrait, to make uſe of certain precautions, and to require the formalities commonly eſtabliſhed by the cuſtom of nations. He has a right to levy ſmall duties on the veſſels that paſs on account of the inconvenience they give him by obliging him to be on his guard; by the ſecurity he procures them in protecting them from their enemies, and keeping pirates at a diſtance; and the expenſe he is at in maintaining light-houſes, ſea-marks, and other things neceſſary to the ſafety of the mariners. Thus the King of Denmark requires a cuſtom at the ſtraits of the Sound. Such rights ought to be founded on the ſame reaſons, and to be ſubject to the ſame rules as the tolls eſtabliſhed by land or on a river. (See § 103, and 104.)

293. The right to wrecks.

It is neceſſary to mention the right to ſhipwrecks the unhappy fruits of barbariſm, and which almoſt every where diſappeared with it. Juſtice and humanity cannot allow of it except in the only caſe where the proprietors of the effects ſaved from a wreck cannot be certainly known. In this caſe theſe effects belong to the firſt poſſeſſor, or to the ſovereign, if the law gives him a right to them.

§ 294. Of the ſea incloſed within the territories of a nation.

If a ſea is found intirely encloſed by the land of a nation, with only a communication with the ocean by a channel, of which that nation may take poſſeſſion, it appears that ſuch a ſea is no leſs capable of being occupied, and becoming property than the land; and it ought to follow the

the fate of the country that ſurrounds it. The Mediterranean was formerly included within the lands of the Romans; that people, by rendering themſelves maſters of the ſtrait, that joins it to the ocean, might ſubject it to their empire, and add it to their domain. They did not by this means injure the rights of other nations; a particular ſea being manifeſtly deſigned by nature for the uſe of the countries and the people who ſurround it. Beſides, in defending the entrance of the Mediterranean from all ſuſpected veſſels, the Romans ſecured by one ſingle ſtroke the immenſe extent of their coaſt; this reaſon was ſufficient to authoriſe them to poſſeſs it. And as it has an abſolute communication with none but their ſtate, they were at liberty to permit or prohibit the entrance into it, in the ſame manner as into any of their towns and provinces.

§ 295. Of the parts of the ſea poſſeſſed by a power, that are not within his juriſdiction.

When a nation takes poſſeſſion of certain parts of the ſea it enjoys the empire, as well as the domain; from the ſame reaſon, we have alledged in treating of land (§ 205.) Theſe parts of the ſea are within the juriſdiction or the territory of the nation; the ſovereign commands there, he makes laws, and may puniſh thoſe who violate them; in a word, he has the ſame rights there as at land, and in general all thoſe given him by the law of the ſtate.

It is however true that the *empire* and *domain*, or the *property* are not inſeparable in their own nature, even in a ſovereign ſtate [p]. So that a nation may poſſeſs as property the domain of a ſtate at land or ſea without having the ſovereignty; it may alſo happen that it may have the empire of a place where the property or the domain with reſpect to uſe belongs to ſome other nation. But it is always preſumed, that when it poſſeſſes the uſeful domain of any place whatſoever, it has alſo the high domain and the empire or ſovereignty (§ 205.) It cannot however be concluded that he who has the empire, has alſo the uſeful domain; for a nation may have good reaſon to claim the empire in a coun-

[p] See Book II. § 83.

try, and particularly in a ſpace at ſea, without pretending to have any property, on any uſeful domain. The Engliſh have never pretended to have a property in all the ſeas over which they have claimed the empire.

This is all we have to ſay in this firſt book. A larger detail of the duties and rights of a nation with reſpect to itſelf would have led us too far: they ſhould be ſought for, as we have already ſaid, in particular treaties on the public and political law. We are very far from flattering ourſelves that we have omitted no important article: this is a ſlight ſketch of an immenſe picture: but an intelligent reader will without difficulty ſupply all our omiſſions by making uſe of general principles: we have taken the utmoſt care ſolidly to eſtabliſh theſe principles, and to unfold them clearly and with preciſion.

THE

THE LAW OF NATIONS.

BOOK II.

Of a Nation considered relatively to others.

CHAP. I.

Of the common Duties of a Nation towards others, or of the Offices of Humanity between Nations.

§ 1. Foundation of the common and mutual duties of nations.

THE following maxims will seem very ſtrange to cabinet politicians, and ſuch is the misfortune of mankind that to many of thoſe refined conductors of nations the doctrine of this chapter will be a ſubject of ridicule. Let it be ſuch, while we boldly lay open what the law of nature preſcribes to nations. Shall we be intimidated by ridicule, when we ſpeak after Cicero? That great man held the reins of the moſt potent ſtate, that ever exiſted, and in that ſtation appeared no leſs eminent than at the bar. The punctual obſervation of the law of nature, he conſidered as the moſt ſalutary policy to the ſtate. I have already quoted this fine paſſage: *Nihil eſt quod adhuc de Republica putem dictum, & quo poſſim longius progredi, niſi ſit confirmatum, non modo falſum eſſe illud, ſine injuria non poſſe, ſed hoc veriſſimum ſine ſumma juſtitia Republicam regi*

non posse [b]. I might say on good grounds, that by these words *summa justitia* Cicero means that universal justice which consists in the entire and absolute accomplishment of the law of nature. But in another place he explains himself more clearly on this head, and gives us sufficiently to understand that he does not limit the mutual duties of men to the observation of justice, properly so called. "Nothing, says he, is more agreeable to nature, more capable of giving a true satisfaction, than, in imitation of "Hercules, to undertake even the most arduous and painful labours for the benefit and preservation of all nations." *Magis est secundum naturam, pro omnibus gentibus, si fieri possit, conservandis, aut juvandis maximos labores molestiasque suscipere, imitantem Herculem illum, quem hominum fama, beneficiorum memor, in concilium cœlestium collocavit; quam vivere in solitudine, non modo sine ullis molestiis, sed etiam in maximis voluptatibus, abundantem omnibus copiis ut excellas etiam pulchritudine & viribus. Quocirca optimo quisque & splendidissimo ingenio longe illam vitam huic anteponit* [c]. Cicero in the same chapter expressly refutes those who are for excluding strangers from the duties to which they acknowledge themselves bound towards their fellow citizens. *Qui autem Civium rationem dicunt habendam, externorum negant, hi dirimunt communem humani generis societatem: quâ sublata, beneficientia, liberalitas, bonitas, justitia funditus tollitur; quæ qui tollunt, etiam adversus Deos immortales impii judicandi sunt; ab iis enim constitutam inter homines societatem evertunt.*

And why should we not hope still to find among those who are at the head of affairs some wise persons, who are convinced of this great truth: that virtue is, even for sovereigns and political bodies, the most certain road to prosperity and happiness. There is at least one benefit to be expected from the open assertion and publication of sound maxims, which is, that thereby even they who least relish

[b] *Fragm. ex Lib.* II. *De Republica.*

[c] *De officiis, Lib.* III. *Cap.* V.

them,

them, are, in regard to their reputation, laid under a neceſſity of keeping within ſome bounds. To expect that men, and eſpecially men in power, will conform to the ſtrictneſs of the laws of nature would be a groſs miſtake, and to renounce all hope of making impreſſion on ſome of them would be to give up mankind for loſt.

Nations as obliged by nature reciprocally to cultivate human ſociety (Prelim. § 11.) are bound to obſerve towards each other all the duties which the ſafety and advantage of that ſociety required.

§ 2. Offices of humanity and their foundation.

The offices of humanity are thoſe ſuccours, thoſe duties, to which men are reciprocally obliged as men, that is, as ſocial beings which neceſſarily ſtand in need of a mutual aſſiſtance for their preſervation, for their happineſs and for living in a manner conformable to their nature. Now the laws of nature being no leſs obligatory to nations than individuals (Prelim. § 5.) what a man owes to other men, a nation, in its manner, owes to other nations (Prelim. § 10. &c.) Such is the foundation of the common duties of thoſe offices of humanity to which nations are reciprocally bound one to another. They conſiſt generally in doing for the conſervation and happineſs of others all that is in our power, as far as this is reconcilable with our duties towards ourſelves.

§ 3. General principles of all the mutual duties of nations.

The nature and eſſence of man being incapable of ſufficing itſelf, preſerving itſelf, perfecting itſelf, or of living happily without the aſſiſtance of others of his ſpecies, is a plain indication that he is diſpoſed to live in a ſociety for mutual aſſiſtance; and conſequently that all men by their very nature and eſſence are obliged to unite their endeavours and labours for the perfection of their being, and their condition. The ſureſt method of ſucceeding herein is, that every one firſt labours for himſelf, and then for others. Hence it follows that whatever we owe to ourſelves, we likewiſe owe to others, as they ſtand in need of ſuccour, and we can ſuccour them without being wanting to ourſelves. Since then one nation owes, in a manner, to another

another nation, what one man owes to another, we may confidently lay down this general principle: One ſtate owes to another ſtate whatever it owes to itſelf, as far as this other ſtands in real need of its aſſiſtance, and the latter can grant it without neglecting the duties it owes to itſelf. Such is the eternal and immutable law of nature. They to whom this may appear a total ſubverſion of ſound policy it is to be hoped will be convinced by the two following conſiderations.

1. Social bodies or ſovereign ſtates are much more capable of ſupporting themſelves than individuals, and mutual aſſiſtance is not ſo neceſſary among them, nor of ſuch frequent uſe. Now whatever a nation can do itſelf, no ſuccour is there due to it from others.

2. The duties of a nation towards itſelf, and chiefly the care of its own ſafety, require much more circumſpection and reſerve, than is to be obſerved by a private perſon in his aſſiſting others. This remark we ſhall ſoon illuſtrate.

§ 4. Duties of a nation for the conſervation of others.

Of all the duties of a nation towards itſelf, the chief object is its conſervation and perfection, together with that of its condition. The detail given of it in the firſt book of this work may ſerve to indicate the ſeveral objects relatively to which a ſtate may and ſhould aſſiſt another ſtate. Therefore every nation is, on occaſion, to labour for the preſervation of others, and for ſecuring them from deſtruction and ruin as far as it can, without expoſing itſelf too much. Thus when a neighbouring nation is unjuſtly attacked by a powerful enemy, threatening to over-run and oppreſs it; if you can defend it without expoſing yourſelf to any great danger, unqueſtionably it is your duty. Do not object that a ſovereign is not to expoſe the lives of his ſoldiers, for the ſafety of a foreign nation with which he has not contracted a defenſive alliance. It may be his own caſe to ſtand in need of ſuccour, and conſequently to promote and exert the ſpirit of aſſiſtance is acting for the ſafety of his own nation. Accordingly policy here coincides with, and enforces obligation and duty. It is the intereſt

of

of princes to ſtop the progreſs of an ambitious power, which aims at a farther aggrandizement by ſubduing its neighbours. A powerful league was formed in favour of the United Provinces when threatened with the yoke of Lewis XIV [d]. When the Turks had laid ſiege to Vienna, the brave Sobieſkei king of Poland with an army came and ſaved the houſe of Auſtria [e]. And poſſibly, by the ſame glorious action, all Germany and his own kingdom.

§ 5. It is to aſſiſt a nation under famine or any other calamities.

From the ſame reaſon, if a people labour under a famine, all having a quantity of proviſions are to relieve its diſtreſs, yet without expoſing themſelves to want. But if this nation is able to pay for the proviſions thus furniſhed, it is entirely lawful to ſell them at a reaſonable rate; for what it can procure is not due to it, and conſequently there is no obligation of giving for nothing ſuch things as it is able to purchaſe. Succour, in ſuch a ſevere extremity, is eſſentially agreeable to human nature, and a civil nation very ſeldom is ſeen to be abſolutely wanting in ſuch. The great Henry IV. would not deny provinces to obſtinate rebels bent on his deſtruction [f].

Whatever be the calamity with which a nation is afflicted, the like aſſiſtance is due to it. We have ſeen little ſtates in Switzerland order public collections to be made in behalf of towns or villages of neighbouring countries which had been ruined by fire, and remit them liberal ſuccours; no difference of religion diverting them from a work of ſuch true piety. The calamities of Portugal have given England an opportunity of fulfilling the duties of humanity with that generoſity which diſtinguiſhes an opulent, powerful and magnanimous nation. On the firſt advice of the misfortune of Liſbon [g], the parliament voted a hundred thouſand pounds ſterling for the relief of an unfortunate people; the king alſo was pleaſed to add conſiderable ſums; ſhips loaded with proviſions and all kinds of ſuccours were

[d] In 1672.
[e] He defeated the Turks and drove them from Vienna in 1683.
[f] At the famous ſiege of Paris.
[g] The earthquake by which the greateſt part of that city was deſtroyed.

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ſent away with the utmoſt diſpatch; and their arrival convinced the Portugueſe, that in thoſe who underſtand the rights of humanity, the oppoſition of belief and worſhip is no obſtacle to their beneficence. On the ſame occaſion the king of Spain likewiſe ſignalized for a near ally, his tenderneſs, his ſympathy, and generoſity.

§ 6. To contribute to the perfection.

A nation muſt not confine itſelf to the preſervation of other ſtates; it ſhould likewiſe, according to its power and their want of its aſſiſtance, contribute likewiſe to their perfection. We have already ſhewn (Prelim. § 13.) that this general obligation is incumbent on it from natural ſociety: this is now a proper place for entering into ſome detail of it. A ſtate is more or leſs perfect, as it is more or leſs adapted to obtain the end of civil ſociety, which conſiſts in procuring to its members all things relating to the neceſſities, conveniencies and enjoyments of life, and to their welfare in general; likewiſe in providing for the peaceful enjoyment of property, and the ſafe and eaſy adminiſtration of juſtice; in fine, for defence againſt any foreign violence (Book I. § 15.). Thus every nation ſhould occaſionally, and according to its power, contribute, not only that another nation may enjoy theſe advantages, but likewiſe render it capable of procuring them itſelf. Accordingly a learned nation, if applied to for maſters and teachers in the ſciences, by another deſirous of ſhaking off its native barbariſm, is not to refuſe ſuch a requeſt. A nation whoſe happineſs it is to live under wiſe laws ſhould, on occaſion, make it a point to communicate them. Thus when the wiſe and virtuous Rome ſent ambaſſadors to Greece for collecting good laws, the Greeks were very far from rejecting a requeſt ſo equitable and worthy of commendation.

§ 7. But not by force.

But though a nation be obliged to promote, as far as lies in its power, the perfection of others, it is not intitled forcibly to obtrude theſe good offices on them. Such an attempt would be to violate their natural liberty. To compel any one to receive a kindneſs requires an authority over him; and nations are abſolutely free and independent (Prelim.

lim. § 4.). Thoſe ambitious Europeans who attacked the American nations, and ſubjected them to their inſatiable avidity of dominion, in order, as they pretended, for civilizing them, and cauſing them to be inſtructed in the true religion; theſe uſurpers, I ſay, grounded themſelves on a pretence equally unjuſt and ridiculous. It is ſtrange to hear the learned and judicious Grotius ſay, that a ſovereign may juſtly take up arms to chaſtiſe nations which are guilty of enormous faults againſt the laws of nature, *which treat their parents with inhumanity like the Soldans: which eat human fleſh as the ancient Gauls, &c.* [h]. What led him into this error was, his attributing to every independent man, and thereby even to every ſovereign, an odd kind of right to puniſh faults which imply an enormous violation of the laws of nature; though relating neither to his right nor his ſafety. We have ſhewn (Book I. § 169.) that men entirely derive the right of puniſhment from the law of ſafety, and conſequently it belongs to them only againſt thoſe by whom they have been injured. Could it eſcape Grotius, that notwithſtanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthuſiaſm and fanaticiſm, and furniſhes ambition with numberleſs pretences? Mahomet and his ſucceſſors have deſolated and ſubdued Aſia to revenge the indignity done to the unity of the Godhead; all whom they termed aſſociators or idolaters fell victims to their devout fury.

§ 8. Of the right of acquiring the offices of humanity.

As the reciprocation of theſe duties or offices of humanity is to take place between nation and nation, according as one ſtands in need, and the other can reaſonably comply with them; every nation being free, independent, and having the diſpoſal of its actions, each is to conſider whether its ſituation warrants aſking or granting any thing on this head. Thus 1. Every nation has a perfect right to aſk of another that aſſiſtance and kind offices which it conceives itſelf to ſtand in need of. This it cannot be denied without injury. If the demand be unneceſſary it is thereby guilty

[h] *De jure belli et pacis Lib.* II. *Cap.* XX. § 21.

of

of a breach of duty; but herein it does not depend on the judgment of another. A nation has a right of asking, but not of requiring.

§ 9. Of the right of judging whether they are to be granted.

For 2. These offices being due only in necessity, and by a nation which can comply with them without being wanting to itself; the nation which is applied to has, on the other hand, a right of judging whether the case really demands them, and whether circumstances will allow it to grant them consistently with what is owing to its own safety and concerns: for instance, a nation is in want of corn, and makes a demand to purchase a quantity of another; this is to judge whether such a compliance will not expose itself to scarcity; and a denial is to be acquiesced in, without resentment. We have very lately seen a prudent performance of this duty in Russia: it generously assisted Sweden when threatened with a famine; but refused other powers the liberty of purchasing corn in Livonia, itself standing in need of it, and without doubt likewise from substantial reasons of policy.

§ 10. A nation is not to compel another to perform those offices the denial of which is no wrong.

Thus the right which a nation has to the offices of humanity is but imperfect; it cannot compel another nation to the performance of them. That nation which unreasonably declines them offends against equity, which consists in acting conformable to the imperfect right of another, but thereby no injury is done; injury or injustice being a trespass against the perfect right of another.

§ 11. Of the mutual love of nations.

It is impossible that nations should mutually discharge all these several duties if they do not love each other. This is the pure source from which the offices of humanity should proceed; they will preserve the character and perfection of it. Then nations will be seen sincerely and cordially to help each other, earnestly to promote the common welfare, and cultivate peace without jealousy or distrust.

§ 12. Every one to cultivate the friendship of others.

A real friendship will be seen to reign among them, and this happy state consists in a mutual affection. Every nation is obliged to cultivate the friendship of others, carefully

fully avoiding whatever might kindle enmity. To this preſent and direct intereſt often invites wiſe and prudent nations: a more noble intereſt, more general and leſs direct, is too rarely the motive of politicians. If it be inconteſtible that men are to releaſe each other in order to anſwer the views of nature and diſcharge the duties which it preſcribes them, as well as for their own advantage; can it be queſtioned that nations are not under the like reciprocal obligations? Is it in the power of men, on dividing themſelves into different political bodies, to break the ties of the univerſal ſociety which nature has eſtabliſhed amongſt them?

§ 13. To perfect itſelf with a view to the advantage of others and ſet them good examples.

If a man ſhould qualify himſelf for being uſeful to other men, and a citizen for doing good ſervices to his country and fellow citizens; a nation, likewiſe, in perfecting itſelf, is to have in view its being rendered thereby more capable of promoting the perfection and happineſs of other nations; it is to be careful in ſetting them good examples, and conſequently avoid ſetting them a pattern of any thing evil. Imitation is natural to mankind: the virtues of a celebrated nation are ſometimes imitated, and much more frequently its vices and defects.

§ 14. To take care of their glory.

Glory being of ſuch great value and importance to a nation, as we have ſhewn in an expreſs chapter [1]. The obligation of a people extends even to the care of the glory of others; firſt, it ſhould on occaſion contribute to put them in a condition of acquiring true glory; ſecondly, do them in this reſpect all the juſtice due to them, and uſe all proper endeavours that ſuch juſtice be univerſally done them. Laſtly, far from irritating, it ſhould kindly extenuate the bad effect which ſome ſlight blemiſhes might produce.

§ 15. The difference of religion is not to exclude the duties of humanity.

From the manner in which we have eſtabliſhed the obligation of performing the offices of humanity, it plainly appears to be ſolely founded on the nature of man. Therefore no nation can refuſe them to another, under pretence of its profeſſing a different religion: the being a man gives

[1] Book I. Chap. XV.

a title

a title to them. A conformity of belief and worſhip may become a new tie of friendſhip betwixt nations, but no difference in them can warrant us to lay aſide the quality of men, or the ſentiments annexed to it. As we have already related (§ 35.) ſome inſtances well worthy of imitation, let us here do juſtice to the wiſe pontiff who at preſent fills the ſee of Rome [k], and has recently given a very remarkable example, and which cannot be too highly commended. This ſovereign being informed that ſeveral Dutch ſhips being at Civita Vecchia not daring to put to ſea for fear of ſome Algerine corſairs cruiſing in thoſe parts, he immediately iſſued orders that the frigates of the eccleſiaſtical ſtate ſhould convoy thoſe ſhips out of danger; and his nuncio at Bruſſels received inſtructions for ſignifying to the miniſter of the ſtates-general, that his holineſs made it a law to himſelf to protect commerce and perform the duties of humanity without minding any difference of religion. Such exalted ſentiments cannot fail of raiſing a veneration for Benedict XIV. even amongſt proteſtants.

§ 16. Rule and meaſure of the offices of humanity.

How happy would mankind be, were theſe amiable precepts of nature every where obſerved: nations would communicate to each other their products and their knowledge; a profound peace would prevail all over the earth and diffuſe its invaluable fruits; induſtry, the ſciences and the arts would be employed to procure our happineſs, no leſs than to relieve our wants; violent methods of conteſt would be no more heard of: differences would be terminated by moderation, juſtice and equity; the world would have the appearance of a large republic; men live every where like brothers, and each individual be a citizen of the univerſe. That this idea ſhould be but a delightful dream yet it flows from the nature and eſſence of man [l]. But

[k] The late worthy Pope Benedict XIV.

[l] Ergo unum debet eſſe omnibus propoſitum, ut eadem ſit utilitas uniuſcujuſque et univerſorum; quam ſi ad ſe quiſque rapias, diſſolvetur omnis humana conſortio, atque ſi etiam hoc natura præſcribit, ut homo homini, quiſcunque ſit ob eam ipſam cauſam, quod is homo ſit, conſulere velit neceſſe eſt ſecundum eandem naturam omnium utilitatem eſſe communem. *De Offic. Lib.* III. *Cap.* VI.

diſorderly

diſorderly paſſions, private and miſtaken intereſt will never allow of its reality. Let us then conſider what limitation the preſent ſtate of men, the maxims and uſual conduct of nations may ſuperinduce to the practice of theſe precepts of nature, in themſelves ſo endearing and ſalutary to the law of nature, which cannot condemn the good to become the dupes and prey of the wicked, and the victims of their injuſtice and ingratitude. Melancholy experience ſhews that moſt nations mind only ſtrengthening and enriching themſelves, at the expence of others, at lording it over them, and even if an opportunity offers, of oppreſſing and bringing them under the yoke. Prudence does not allow us to ſtrengthen an enemy or him in whom we diſcover a deſire of plundering and oppreſſing us, and the care of our own ſafety forbids it. We have ſeen (§ 3, &c.) that a nation does not owe its aſſiſtance and the offices of humanity to another any farther than as they are reconcileable with the duties towards itſelf. Hence it evidently follows, that though the univerſal love of mankind obliges us to grant at all times, and to all, even to our enemies, thoſe offices which are of a tendency to render them more moderate and virtuous, becauſe no inconveniency is to be feared from ſuch diſpoſitions, we are not obliged to give them ſuch ſuccours as probably may become pernicious to ourſelves. Thus the exceeding importance of trade not only to the wants and conveniencies of life, but likewiſe to the forces of a ſtate for furniſhing it with the means of defending itſelf againſt its enemies, and the inſatiable avidity of thoſe nations which ſeek totally to engroſs it excluſive of others; thus, I ſay, theſe circumſtances authoriſe a nation poſſeſſed of a branch of trade, or the ſecret of ſome important manufacture or fabric, to reſerve to itſelf thoſe ſources of wealth, and ſo far from communicating them, to take meaſures againſt it; but things neceſſary to the life or conveniency of others, this nation muſt ſell them at a reaſonable

reaſonable price, and not abuſe its monopoly by iniquitous and hateful exactions. To commerce England chiefly owes its power and ſafety: who then will preſume to blame the ſtrict attention of that people for keeping the ſeveral branches in its own hand, by every juſt and equitable method?

As to things more directly uſeful for war, a people is under no obligation of ſelling them to others of whom it has any well-grounded ſuſpicion; and even prudence declares againſt it. Thus, very juſtly, by the Roman laws, the art of building gallies was not to be communicated to other nations. Thus in England laws have been enacted, that the beſt method of ſhip-building ſhould not be carried out of the kingdom.

This caution is to be carried farther, to nations more juſtly ſuſpected. Thus when the Turks, to uſe the expreſſion, in their aſcendant, in the flame of their conqueſts it behoved all chriſtian nations, excluſive of any bigotry, to look on them as their enemies. The moſt diſtant, they which at that time had no diſpute with them, might break off all commerce with a power profeſſedly ſubduing, by force of arms, all who would not acknowledge the authority of its prophet.

§ 17. Particular limitation with regard to the prince.

Let us farther obſerve with regard to the prince in particular, that he is not, without reſerve, to comply with all the motions of a magnanimous and diſintereſted heart, poſtponing his intereſt to the advantage of others, or to generoſity, it is not his private intereſt, on which the queſtion turns, but that of the ſtate of the nation which has committed itſelf to his care. Cicero ſays that a great and elevated ſoul depiſes pleaſures, wealth, life itſelf, and makes no account of them when the common utility lies at ſtake[m]. He is in the right, and ſuch ſentiments are to

[m] *De Offic. Lib.* III. *Cap.* V.

be

be admired in a private perſon; but generoſity never injures the property of another. The head or conductor of a nation is, in public affairs, to practiſe it with circumſpection and no farther than it will redound to the glory and real advantage of the ſtate. As to the common good of human ſociety, he is to conſider it with the ſame attention to which the nation he repreſents would be obliged, were the government of its affairs in its own hand.

§ 18. No nation is to hurt others.

But though the duties of a nation towards itſelf, ſet bounds to the obligation of performing the offices of humanity; they cannot, in the leaſt, affect the prohibition of doing any injury to others, of cauſing them any unjuſt detriment. To hurt, to offend, to do injury, to cauſe damage or prejudice are not preciſely of the ſame import. To hurt any one is, in general, to augment the imperfection of himſelf or that of his condition; to render his perſon or condition more imperfect. If every man is obliged, even by his very nature, to aſſiſt in the perfection of others, he is much more forbid to increaſe their imperfection and that of their ſtate. The ſame duties are incumbent on nations (Prelim. § 5, 6.); none of them is to commit any actions tending to impair the perfection of others, and that of their condition, or to impede their progreſs; that is, to truſt them; and ſince the perfection of a nation conſiſts in its aptitude in obtaining the end of civil ſociety, and that of its ſtate, in not wanting any of the things neceſſary to that end (Book I. § 14.); no one is to hinder another from obtaining the end of civil ſociety, or to render it incapable of thoſe ends. This general principle prohibits all nations every evil practice tending to create diſturbance in another ſtate, to foment diſcord, to corrupt its citizens, to alienate its allies, to raiſe enemies, to ſully its reputation, and to deprive it of its natural advantages. However, it will be eaſily conceived that negligence in fulfilling the common duties of humanity, and even the refuſal of theſe duties or offices is not an injury. To

neglect

neglect or refuse contributing to the perfection of a nation is not impairing that perfection. It must be further observed, that when we are making use of our right, when we are doing what we owe to ourselves or to others; if, from this action of ours any prejudice results to the perfection of another, as some damage to its outward condition, we are not guilty of an injury; we are doing what is lawful, or even what we ought. The damage, or whatever it happens to suffer, was no part of our intention; is an accident, of which the particular circumstances determine the imputability. For instance, in case of a lawful defence, the injury we do to the aggressor is not our intention; we act in consideration of our own safety; we make use of our right, and whatever evil befalls the aggressor, he alone is in fault.

§ 19. Of offences.

Nothing is more opposite to the duties of humanity, nor more contrary to the society which should be cultivated by nations than offences, or actions which give a just displeasure to others: every nation therefore should carefully avoid giving any real offence; I say, a real; for should he who manifests a displeasure at our behaviour, when we are only using our rights, or fulfilling our duties, he is to blame, not we. Offences excite such asperity and rancour between nations, that we should avoid giving any room even for ill-grounded offences, when it can be done without any inconveniency, or failure in our duty. It is said, that some medals and dull jests, were what irritated Lewis XIV. against the United Provinces, and were the chief cause of his expedition in 1672, by which that republic was brought to the brink of ruin.

§ 20. Ill custom of the ancients.

The maxims laid down in this chapter, as the sacred precepts of nature, were for a long time unknown to nations. The ancients had no notion of any duty they owed to a nation to whom they were not united by a treaty of friendship. The Jews especially placed a great part of their zeal in hating all nations; but they likewise were detested

detested and despised by them. At length the voice of nature came to be heard amongst civilized nations; they perceived that all men are brethren [b]. When will the happy time come that they shall behave as such?

CHAP. II.

Of the mutual Commerce of Nations.

§ 21. Of the mutual commerce of nations.

ALL men are to find on earth the things they stand in need of. In the primitive state of community they took them wherever they happened to meet with them, if another had not before appropriated them to his use. The introduction of property and dominion could not deprive men of so essential a right, and consequently it cannot take place without leaving them, in general, some means of procuring what is useful or necessary to them. This means is trade; by this every man may still supply his wants. Things being now become property, there is no obtaining them without the owners consent; nor are they usually to be had for nothing, but they may be bought or exchanged for others equivalent. Therefore men are obliged, in regard to the views of nature, reciprocally to exercise this trade; and this obligation relates also to whole nations or states (Prelim. § 5.). It is seldom that nature is seen in one place to produce every thing man stands in need of; one country abounds in corn, another in pastures and cattle, a third in timber and metals: all these countries trading together, agreeably to human nature, no one will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Farther, one country is fitter for some kind of products than another; as for vineyards, more

[b] See (§ 1.) a fine passage of Cicero.

than tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its induſtry and its ground in the moſt advantageous manner; and mankind in general proves a gainer by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce.

§ 22. We ſhould favour trade.

Therefore every one is not only to join in this trade, as far as it reaſonably can, but even to countenance and promote it. The care of the public roads, ſtaples, places of ſale, well-regulated fairs; all contribute to this end. And as for the requiſite expences, a nation, as we have already obſerved (Book I. § 103.) may defray them by tolls and other duties in an equitable proportion.

§ 23. Of the freedom of trade.

Freedom, being very uſeful to commerce, it is implied in the duties of nations, that inſtead of unneceſſary burdens or reſtrictions, they ſhould ſupport it as far as poſſible; therefore thoſe privileges, thoſe particular duties which obtain in many places ſo oppreſſive to commerce, are blameable, unleſs founded on very important reaſons ariſing from the public good.

§ 24. Of the right of trading belonging to nations.

Every nation, in virtue of its natural liberty, has a right to trade with thoſe which ſhall be willing to correſpond with ſuch intentions; and to moleſt it in the exerciſe of its right, is an injury. The Portugueſe, at the time of their great power in the Eaſt Indies, were for excluding all other European nations from any commerce with the Indians; but a pretenſion no leſs iniquitous than chimerical was made a jeſt of; and the nations agreed to look on any acts of violence in ſupport of it as juſt cauſes of a war. This common right of all nations is, at preſent, generally acknowledged under the appellation of freedom of trade.

§ 25. Every one is to judge whether it be proper for it to trade.

If it be in general the duty of a nation to carry on a commerce with others, and every one has a right to trade with thoſe who are willing; on the other hand, a nation

nation is to decline a commerce which is disadvantageous or dangerous (Lib. 1. § 98.): and since in case of a collision the duties towards oneself are to take the lead of the duties towards others, it has a full power of being determined herein by what is useful or salutary. We have seen (Book I. § 92.) that besides the right, it is a nation's duty to judge whether it be expedient to join in a trade proposed, or not; therefore it may close with, or refuse any commercial overtures from foreigners, without giving them a right to accuse it of injustice, or to demand a reason for such refusal, much less to make use of compulsion. It is free in the administration of its affairs, without being accountable to any other. The obligation of trading with a foreign state is imperfect in itself (Prelim. § 17.) and gives them only an imperfect right; so that in cases where the commerce would be detrimental, it is entirely void. The Spaniards falling on the Americans under a pretence that these people refuse to traffic with them, endeavoured in vain to cover their insatiable avarice.

§ 26. Necessity of treaties of commerce.

These few remarks, together with what we have already said on the subject (Book I. Chap. VIII.) may suffice to establish the principles of the natural law of nations on the mutual commerce of states. It is not difficult to point out, in general, what are the duties of nations in this respect, and what the law of nature prescribes to them for the good of the great society of mankind. But every one being obliged to trade with others, only as far as it can without being wanting to itself; and, in fine, as the whole depends on the judgment each state shall form of what it can and ought to do in particular cases; nations can make sure only of generalities, the liberty which belongs to each for trading, being founded on imperfect rights depending on the judgment of another, are consequently always uncertain. Therefore if they are for securing to themselves some-

thing conſtant, punctual and determined treaties are the means by which they muſt procure it.

§ 27. General rule concerning theſe treaties.

A nation having a full right to regulate itſelf in commercial affairs by what is uſeful or advantageous, it may make ſuch commercial treaties as it ſhall think proper; and no other has a right to take offence, provided theſe treaties do not affect the perfect rights of another. If by the engagements contracted a nation unneceſſarily, or without powerful reaſons, and renders itſelf incapable of joining in the general trade which nature recommends betwixt nations, it treſpaſſes againſt its duty. But the nation being the ſole judge of this (Prelim. § 16.), others, in regard to natural liberty, are to acquieſce, and even ſuppoſe that it acts on good reaſons. Therefore every treaty of commerce, not affecting the perfect right of another, is allowable among nations, and the execution thereof not to be oppoſed. But that alone is in itſelf juſt and commendable which, as far as is poſſible and reaſonable in the particular caſe, is tranſacted with a tenderneſs for the general intereſt.

§ 28. Duty of nations in making theſe treaties.

As expreſs promiſes and engagements ſhould be inviolable, every wiſe and virtuous nation will be careful previouſly to examine and weigh a treaty of commerce before the concluding, that it may not thereby be engaged to any thing contrary to the duties it owes itſelf and others.

§ 29. Perpetual or temporal treaties are revokable at pleaſure.

Nations may in their treaties inſert ſuch clauſes and conditions as they think proper; they are at liberty to make them perpetual or temporary, or dependent on certain events. It is uſually moſt prudent not to engage for ever, as junctures may afterwards intervene by which the treaty might become very oppreſſive to one of the contracting parties. A precarious right only may be granted by a treaty, the nation reſerving the liberty of revoking it at pleaſure. We have already noticed (Book I. § 94.) that a ſimple permiſſion, nor neither a long cuſtom (Ibid. § 95.) gives any perfect right to a trade. Thus theſe things are not to be confounded with

with treaties; not even with those giving only a precarious right.

§ 30. Nothing contrary to the tenour of a treaty can be granted to a third party.

When once a nation has entered into engagements by treaty, it is no longer at liberty to do, in favour of others, contrary to the tenour of the treaty, what it might otherwise have granted to them agreeably to the duties of humanity, or to the general obligation of reciprocal commerce; being to do for others no more than what is in its power. Having deprived itself of the liberty of disposing of a thing, that thing is no longer in its power. Therefore when a nation has engaged to another that it will sell only to them certain goods or provisions; as for instance, corn; it can no longer carry them for sale to another market. The case is the same in a contract to purchase certain goods only of that nation.

§ 31. How lawful to deprive oneself by treaty of trading with another nation.

But it will be asked, how and on what occasions a nation may enter into engagements which cancel the liberty of fulfilling its duties with others? As the duties towards oneself are to take place before the duties to others, if a nation finds its safety and real advantage in a treaty of this nature, unquestionably such a treaty is lawful; and the more, as it thereby makes no breach in the general commerce of nations; it only causes one branch of its trade to pass through other hands; or it ensures to a particular people such things as they want. If a state which stands in need of salt can secure a supply of it from another, by engaging to sell its corn and cattle only to this other nation, who will doubt but it has a right to conclude so salutary a treaty? Its corn or cattle are goods which it disposes of for supplying its own wants. But from what we have observed (§ 28.) these kinds of engagements are not to be entered into, without very good reasons. However, be the reasons good or bad, the treaty is still valid, and other nations have no right to oppose it (§ 27.).

§ 32. A nation may abridge its commerce in favour of another.

Every one is at liberty to recede from his right; a nation may lay a restriction on its commerce in favour of

of another, engage not to traffic in a certain kind of goods, forbare trading with ſuch and ſuch a country, &c. And in departing from ſuch engagements it acts againſt the perfect right of the nations with which it has contracted; and the latter has a right of bringing it to reaſon. The natural liberty of trade is not hurt by treaties of this nature; for this liberty conſiſts only in every nation being unmoleſted in the right of trading with thoſe which conſent to traffic with it; every one remaining free to cloſe with or decline a particular commerce as it ſhall judge moſt advantageous.

§ 33. May appropriate a trade to itſelf.

Nations carry on trade not only to procure things for neceſſity, uſe, conveniency, and delight; but they likewiſe make it a fund of opulence. Now on an occaſion of gain, all are equally allowed to endeavour for a pact; but the moſt diligent very lawfully prevents the others by taking poſſeſſion of an advantage, which lies open to the firſt occupier; he may even ſecure the whole entirely to himſelf, if he has any lawful way for appropriating it. Thus if a nation alone produces certain things, another may lawfully procure itſelf by treaty the advantage of being the only buyer; and then ſell them again all over the world. And it is indifferent to nations from what hand they receive the commodities they want, provided the price be reaſonably equal, and the monopoly of this nation does not claſh with the general duties of humanity, unleſs it avails itſelf of this advantage, for ſetting an exorbitant price on its goods. Should it abuſe its monopoly to an immoderate gain, this would be an offence againſt the law of nature, as by ſuch an exaction it deprives other nations of a neceſſary or agreeable product which nature deſigned for all men; yet no wrong is done, becauſe ſtrictly ſpeaking, and according to external right, the owner of a commodity may either keep it, or ſet what price he pleaſes on it. Thus the Dutch, by a treaty with the king of Ceylon, have engroſſed the cinnamon

trade

trade into their hands; yet, whilſt they keep their profits within juſt limits, no nation has any cauſe of complaint.

But did the queſtion relate to commodities neceſſary to life, and the monopoliſer was for raiſing them to an exceſſive price, other nations would be authoriſed by the care of their own ſafety, and the advantage of human ſociety, to join in bringing an avaricious oppreſſor to reaſonable terms. The right to neceſſaries is very different from that to things adapted only to conveniency and delight, which, if they are too highly raiſed, we can ſafely go without. It would be abſurd that the ſubſiſtence and being of nations ſhould depend on the caprice or avidity of one.

§ 34. Of conſuls.

Among the modern inſtitutions for the utility of commerce, one of the moſt uſeful is that of conſuls or perſons reſiding in the large trading cities, and eſpecially in foreign ſea-ports, with a commiſſion empowering them to attend to the rights and privileges of their nation, and to terminate miſunderſtandings and conteſts among its merchants. When a nation trades largely with a country, it is requiſite to have there a perſon charged with ſuch a commiſſion, and as the ſtate which allows of this commerce muſt naturally favour it; ſo for the ſame reaſon it is likewiſe to admit a conſul. But there being no abſolute and perfect obligation to this, the nation diſpoſed to have a conſul, muſt procure itſelf this right by the very treaty of commerce.

The conſul being charged with the affairs of his ſovereign, continues accountable for his actions, and ſubject to him.

The conſul is no public miniſter (as will appear by what we ſhall ſay of the character of miniſters, in our fourth book), and cannot pretend to the privileges appertaining to ſuch character. Yet bearing his ſovereign's commiſſion, and being in this quality received

by

by the prince in whoſe dominions he reſides, he is, in a certain degree, intitled to the protection of the law of nations. This ſovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and ſafety neceſſary in the proper diſcharge of his functions, without which the admiſſion of the conſul would be inſignificant and deceptive. His functions firſt require, that he be not a ſubject of the ſtate where he reſides; as, then he would be obliged in all things to conform to its orders, and thus not be at liberty to acquit himſelf of the duties of his poſt.

They ſeem to require that the conſul ſhould be independent of the ordinary criminal juſtice of the place where he reſides, ſo as not to be moleſted or impriſoned, unleſs he himſelf violates the laws of nations by ſome enormous miſdemeanor.

And though the importance of the conſular functions be not ſuch as to procure to the conſul's perſon the inviolability and abſolute independence enjoyed by public miniſters; yet being under the particular protection of the ſovereign who employs him, and inſtructed with his concerns, if he commits any crime, he is, from the reſpect due to his maſter, to be ſent home, in order for puniſhment. This is the conduct of ſtates who are inclined to preſerve a good underſtanding; but the ſureſt way is, expreſsly to ſettle all theſe things in a treaty of commerce.

Wicquefort, in his treatiſe of *The Ambaſſador*, Book I. § V. ſays *that conſuls do not enjoy the protection of the law of nations, and that both in civil and criminal caſes they are ſubject to the juſtice of the place where they reſide.* But the very inſtances he cites contradict his propoſition. The ſtates-general of the United Provinces, whoſe conſul had been affronted and put under arreſt by the governor of Cadiz, *complained of it to the court of Madrid as a breach of the laws of nations.* And in the *year* 1634 *the republic of Venice was near coming to a rupture*

rupture with pope Urban VIII. on account of the inſult done to the Venetian conſul by the governor of Ancona. The governor ſuſpecting this conſul to have given an information detrimental to the commerce of Ancona, after putting ſeveral indignities on him, cauſed his papers and the beſt part of his furniture to be carried off, and himſelf to be ſummoned, declared guilty of contumacy, and baniſhed *under pretence that, contrary to public prohibition, he had cauſed goods to be unloaded in a time of contagion.* This conſul's ſucceſſor he likewiſe impriſoned; but by the mediation of the miniſters of France, who interpoſed to prevent an open rupture, the pope obliged the governor of Ancona to make the republic ſatisfaction.

In the want of treaties, cuſtom is to be the rule on this occaſion; for a prince receiving a conſul without expreſs conditions, is ſuppoſed to receive him on the footing eſtabliſhed by cuſtom.

CHAP. III.

Of the Dignity and Equality of Nations, of Titles, and other Marks of Honour.

§ 35. Of the dignities of nations or ſovereign ſtates.

EVERY nation, every ſovereign and independent ſtate, deſerves conſideration and reſpect, becauſe it makes an immediate figure in the grand ſociety of the human race, is independent of all earthly power, and is an aſſemblage of a great number of men who are, doubtleſs, more conſiderable than any individual. The ſovereign repreſents his whole nation, he unites in his perſon all its majeſty. No individual, though ever ſo free and independent, can be placed in competition with the ſovereign; this would be to put a ſingle perſon alone upon an equality with an united multitude of his equals. Nations and ſovereigns, are then, at the ſame time under an obligation, have a right to maintain their dignity, and to cauſe it to be reſpected as of the utmoſt importance to their ſafety and tranquillity.

We

§ 36. Of their equality.

We have already obſerved (Prelim. § 18.) that nature has eſtabliſhed a perfect equality of rights between independent nations. Conſequently none can naturally pretend to prerogative: their right to freedom and ſovereignty renders them equals.

§ 37. Of precedency.

And ſince precedency or pre-eminence of rank is a prerogative no nation, no ſovereign can attribute to himſelf naturally and of right; why ſhould nations, who have no dependence on him, yield to him any thing in ſpite of themſelves? However, as a powerful and vaſt ſtate is much more conſiderable in the univerſal ſociety, than a ſmall ſtate, it is reaſonable, that this laſt ſhould yield to it, on occaſions where one muſt yield to the other, as in an aſſembly, and ſhew it thoſe mere ceremonial deferences, which, in reality, do not deſtroy their equality, and only ſhew a priority of order, a firſt place among equals. Others will naturally attribute this firſt place to the moſt powerful, and it would be as uſeleſs as ridiculous, for the weaker obſtinately to contend about it. The antiquity of the ſtate on theſe occaſions, alſo enters into conſideration; a new-comer cannot diſpoſſeſs a perſon of the honour he has enjoyed, and he muſt produce very ſtrong reaſons, before he can cauſe himſelf to be preferred.

§ 38. The form of government is foreign to this queſtion.

The form of government is naturally foreign to this queſtion. The dignity, the majeſty reſides originally in the body of the ſtate; that of the ſovereign is derived from his repreſenting the nation. Has the ſtate more or leſs dignity according as it is governed by a ſingle perſon, or by many? At preſent kings claim a ſuperiority of rank over republics: but this pretenſion has no other ſupport than the ſuperiority of their ſtrength. Formerly, the Roman republics conſidered all kings as very far beneath them: but the monarchies of Europe finding none but weak republics, have diſdained to admit them to an equality. The republic of Venice, and that of the United Provinces, have obtained the honours of crowned heads; but their ambaſſadors give place to thoſe of kings.

In

§ 39. A ſtate ought to keep its rank, notwithſtanding the changes in the form of its government.

In conſequence of what we have juſt eſtabliſhed, if the form of government in a nation happens to be changed, it will preſerve the ſame honours and rank of which it was before in poſſeſſion. When England had driven out her king, Cromwell would not ſuffer any thing to be abated of the honours that had been paid to the crown, or to the nation; and he every where knew how to maintain the Engliſh ambaſſadors in the rank they had always poſſeſſed.

§ 40. In this reſpect treaties and eſtabliſhed cuſtoms ought to be obſerved.

If treaties or a conſtant cuſtom founded on a tacit conſent, have eſtabliſhed rank, it is neceſſary to conform to it. To diſpute with a prince the rank he has acquired in this manner, is to do him an injury, ſince it is giving him a mark of contempt, or violating engagements that ſecure to him a right. Thus the partitions improperly made in the houſe of Charlemagne having given the empire to the eldeſt; the youngeſt who had the kingdom of France, yielded to him the more eaſily, as there remained at that time a recent idea of the true majeſty of the Roman empire. His ſucceſſors followed what they found eſtabliſhed; they were imitated by the other kings of Europe, and thus the imperial crown became, without oppoſition, in poſſeſſion of the firſt rank in Chriſtendom. Moſt of the other crowns have not agreed among themſelves about their rank.

Some would have the precedence of the emperor appear ſomething more than the firſt place among equals, they attribute to him a ſuperiority over all kings, and in a word make him the temporal head of Chriſtendom [c]. And it in fact appears, that many emperors have thought of the like pretenſions; as if by reviving the name of the Roman empire, they could alſo revive its rights. The other ſtates have been on their guard againſt theſe pre-

[c] Bartolus went ſo far as to ſay, that all thoſe were heretics, who did not believe that the emperor was Lord of the whole earth. See Bodinus's Republic, Book I. Chap. IX. p. m. 139.

tenſions.

tenſions. We may ſee in Mezeray [d] the precaution taken by king Charles V. when the emperor Charles IV. went into France, "for fear, ſays the hiſtorian, that this "prince, and his ſon the king of the Romans, ſhould "found ſome right of ſuperiority on his courteſy." Bodinus relates [e], that the French took offence at the emperor Sigiſmund's placing himſelf in the royal ſeat in full parliament, and at his having conferred on de Beaucaire the title of Chevalier le Senechal, adding, that to cover the remarkable fault they had committed in ſuffering it, they would not allow the ſame emperor, when at Lyons, to make the count of Savoy a duke. At preſent the king of France would doubtleſs think, that he was wanting to himſelf, if he diſcovered the leaſt thought that another might claim any authority in his kingdoms.

§ 41. Of the name and honours given by the nation to its conductor.

A nation may grant to its conductor what degree of authority, and what rights it thinks proper: it is equally free in regard to the name, the titles, and honours with which it would decorate him. But it is agreeable to its wiſdom, and of importance to its reputation, not to deviate in this reſpect, too much from the cuſtoms commonly received among civilized nations. Let us ſtill obſerve, that it ought to be directed there by prudence to proportion titles and honours to the power of its ſuperior, and to the authority with which it would inveſt him. Titles and honours, it is true, determine nothing; they are vain names, and vain ceremonies, when they are ill-placed: but who does not know the influence they have on the thoughts of men? This is then a more ſerious affair than it appears at the firſt glance. The nation ought to take care not to debaſe itſelf before other ſtates, and not to degrade its conductor by too low a title: it ought to be ſtill more careful not to ſwell his heart with a vain name, by unbounded

[d] Hiſtory of France, explication of the medals of Charles V.

[e] In this Republic, p. 138.

honours;

honours; ſo as to make him conceive the thoughts of arrogating to himſelf a power anſwerable to them, or to acquire a proportionable power by unjuſt conqueſts. On the other hand, an important title may engage the conductor to ſupport with greater firmneſs the dignity of a nation. Conjunctures determine the prudence which obſerves in every thing a juſt proportion. "Royalty, ſays a reſpectable author, who may be believed "on this ſubject, drew the houſe of Brandenbourg "from that yoke of ſervitude in which the houſe of "Auſtria then kept all the German princes. This was "a bait which Frederic III. threw to all his poſterity, "and by which he ſeemed to ſay, I have acquired a "title, do you render yourſelves worthy of it; I have "laid the foundations of your grandeur, it is you who "are to finiſh the work [f]."

§ 42. If a ſovereign may attribute to himſelf what title and honours he pleaſes.

If the conductor of the ſtate is ſovereign, he has in his hands the rights and authority of the political ſociety, and conſequently, he may himſelf ordain what title, and honours ought to be paid him, unleſs the fundamental laws have determined them; or the fixed limitations of his power do not manifeſtly oppoſe thoſe he would attribute to himſelf. His ſubjects are obliged to obey him in this, as in whatever he commands in virtue of a lawful authority. Thus the Czar Peter I. from the vaſt extent of his dominions, took upon himſelf the title of emperor.

§ 43. The right of other nations in this reſpect.

But foreign nations are not obliged to give way to the will of a ſovereign, who aſſumes a new title, or to a people who call their conductor by what name they pleaſe.

§ 44. Of their duty.

However, if this title has nothing unreaſonable, or contrary to received cuſtoms, it is altogether agreeable to the mutual duties which bind nations together, to give to a ſovereign or conductor of the ſtate, the ſame title, that is given him by his people. But if this title

[f] *Memoirs of the Houſe of Brandenbourg.*

is

is contrary to cuſtom, if it ſuppoſes what is not to be found in him who affects it, foreign nations may refuſe it without his having reaſon to complain. The title of majeſty is conſecrated by cuſtom to monarchs who command great nations. The emperors of Germany have long pretended to reſerve it to themſelves as belonging ſolely to the imperial crown. But the kings aſſerted with reaſon, that there was nothing on earth more eminent or more auguſt than their dignity: they therefore refuſed the title of majeſty to him who refuſed it to them [s]; and at preſent, except in a few inſtances, founded on particular reaſons, the title of majeſty is properly attributed to the quality of king.

As it would be ridiculous for a little prince to take the title of king, and to cauſe that of majeſty to be given him; foreign nations, by refuſing to comply with this fancy, do nothing but what is conformable to reaſon and their duty. However, if a ſovereign is any where found, who, notwithſtanding the ſmall extent of his power, is accuſtomed to receive from his neighbours the title of king, the diſtant nations who would trade with him, cannot refuſe him that title. It is not for them to reform the cuſtoms of diſtant regions.

§ 45. How they may ſecure titles and honours.

The ſovereign who would conſtantly receive certain titles and honours from other powers, ought to be aſſured of it by treaties. Thoſe who have entered into engagements in this manner are obliged to conform to them, and cannot deviate from the treaty without doing him an injury. Thus in the examples we have lately given, the Czar, and king of Pruſſia, took care to negociate before-hand with the courts in friendſhip with

[s] At the famous treaty of Weſtphalia, the plenipotentiaries of France agreed with thoſe of the emperor, that the king and queen writing with their own hand to the emperor, and giving him the title of majeſty, he ſhould anſwer them, with his own hand, with the ſame title. Letters of the plenipotentiaries to M. de Brienne, Oct. 15, 1646.

them,

them, to ſecure their being acknowledged under the new rank they reſolved to aſſume.

The popes have formerly pretended that it belonged to the Tiara alone to create new crowns; they dared even to hope, that the ſuperſtition of the princes and the people, would allow them ſo ſublime a prerogative. But it vaniſhed at the revival of letters, as ſpectres diſappear at the riſing of the ſun [h]. The emperors of Germany, who have formed the ſame pretenſions, had, at leaſt, on their ſide, the example of the ancient Roman emperors. They only want the ſame power in order to have the ſame right.

§ 46. They ought to conform to general cuſtom.

In want of treaties, we ought to conform to the title, and, in general, to all the marks of honour that have been eſtabliſhed by cuſtom, and generally received. A reſolution to deviate from them with reſpect to a nation or ſovereign, when there is no particular reaſon for it, is to ſhew him contempt or ill-will: a conduct equally contrary to ſound politics, and to what nations owe each other.

§ 47. Of the natural reſpect which ſovereigns owe to each other.

The greateſt monarch ought to reſpect in every ſovereign the eminent character with which he is inveſted. The independence, the equality of nations, the reciprocal duties of humanity, all unite to ſhew the reſpect due to this quality of the conductor of even a ſmall nation. The weakeſt ſtate is compoſed of men as well as the moſt powerful, and our duties are the ſame towards all thoſe who do not depend on us.

But this precept of the law of nature does not extend beyond what is eſſential to the reſpect which independent nations owe to each other; in a word, to what ſhews that they acknowledge a ſtate or its ſovereign to be truly independent and ſovereign, and conſequently,

[h] Catholic princes receive ſtill from the pope, titles that relate to religion. Benedict XIV. gave that of Moſt Faithful to the king of Portugal, and they have been pleaſed not to ſtop at the commanding ſtyle in which the bull is expreſſed. It is dated December 23, 1748.

worthy

worthy of every thing due to that quality. Moreover a great monarch being, as we have already obſerved, a very important perſonage in human ſociety, it is natural for them to render him, in every thing that is not merely ceremonial, and does not injure the equality of the rights of nations; the honours to which a little prince cannot pretend: and this laſt cannot refuſe to the monarch all the reſpect that does no injury to his own independence and ſovereignty.

§ 48. How a ſovereign ought to maintain its dignity.

Every nation, every ſovereign, ought to maintain his dignity (§ 35.) by cauſing the reſpect to be paid to it which is his due; and eſpecially not to ſuffer that any ſtain be caſt upon it. If he has then, titles and honours that belong to him according to conſtant cuſtom, he may require them; and he ought to do it, on occaſions where his glory is concerned.

But it is proper to diſtinguiſh, between negligence on the omiſſion of what ought to be done according to commonly received cuſtom, and poſitive acts of diſreſpect and inſult. The prince may complain of negligence, and if it is not repaired may conſider it as a mark of a bad diſpoſition: he has a right to demand, even by force of arms, the reparation of an inſult. The Czar Peter I. complained in his manifeſto againſt Sweden, for not having fired the cannon on his paſſage to Riga. He might think it ſtrange that they did not pay him this mark of reſpect, and he might complain of it; but to make this the cauſe of a war, was being extremely prodigal of human blood.

CHAP.

CHAP. IV.

Of the Right to Security, the Effects of the Sovereignty, and the Independence of Nations.

§ 49. Of the right of ſecurity.

IN vain does nature preſcribe to nations, as well as to individuals, the care of their ſelf-preſervation, and of advancing their own perfection and happineſs, if it does not give them a right to preſerve themſelves from every thing that can render this care ineffectual. This *right* is nothing more than a *moral power of acting*, that is, the power of doing what is morally poſſible; what is proper and conformable to our duties. We have then in general the right of doing whatever is neceſſary to the diſcharge of our duties. Every nation as well as every man has therefore, a right not to ſuffer any other to obſtruct its preſervation, its perfection, and happineſs, that is, to preſerve itſelf from all injuries (§ 18.): and this right is perfect, ſince it is given to ſatisfy a natural and indiſpenſable obligation; for when we cannot uſe conſtraint, in order to cauſe our right to be reſpected, the effect is very uncertain. It is this right of preſervation from all injury that is called the *right of ſecurity*.

§ 50. It produces the right of reſiſtance.

It is ſafeſt to prevent the evil, when it can be done. A nation has a right to reſiſt an injurious attempt, and to make uſe of force and every honeſt means againſt the power that is actually engaged in oppoſition to it, and even to anticipate its machinations, always obſerving, not to attack it upon vague and uncertain ſuſpicions, in order to avoid expoſing itſelf to become an unjuſt aggreſſor.

§ 51. And that of obtaining reparation.

When the evil is done, the ſame right of ſecurity authorizes the offended to endeavour to obtain a complete reparation, and if neceſſary, to employ force for that purpoſe.

§ 52. And the right of punishing.

In short, the offended has a right to provide for his security for the future, and to punish the offender, by inflicting upon him a pain capable of deterring him afterwards from the like attempts, and of intimidating those who shall be tempted to imitate him. He may even, if necessary, put the aggressor out of the condition to injure him. He makes use of his right in all these measures, when guided by reason; and if any evil results from it to him who lays him under the necessity of acting thus, he can accuse none but his own injustice.

§ 53. The right of all the people against a mischievous nation.

If then there is any where a nation of a restless and mischievous disposition, always ready to injure others, to traverse their designs, and to raise domestic troubles; it is not to be doubted, that all have a right to join in order to repress, chastise, and put it ever after out of its power to injure them. Such should be the just fruits of the policy which Michiavel praises in Cæsar Borgia. The conduct followed by Philip II. King of Spain, was adapted to unite all Europe against him; and it was from just reasons that Henry the Great formed the design of humbling a power, formidable by its forces, and pernicious by its maxims.

The three preceding propositions, are so many principles, that furnish various foundations for a just war, as we shall see in its proper place.

§ 54. No nation has a right to interfere in the government of another state.

It is a manifest consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.

§ 55. One sovereign cannot make himself the judge of the conduct of another.

The sovereign is he to whom the nation has trusted the empire, and the care of the government: it has invested him with its rights; it alone is directly interest-

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ed in the manner in which the conductor it has chosen, makes use of his power. It does not then belong to any foreign power to take cognizance of the administration of this sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it. If he loads his subjects with taxes, and if he treats them with severity, it is a national affair, and no other is called upon to redress it, or to oblige him to follow more wise and equitable maxims. It is for prudence to point out the occasions when a foreign prince may make him officious and amicable representations. The Spaniards violated all rules, when they set themselves up for judges of the Inca Athualpa. If that prince had violated the law of nations with respect to them, they would have had a right to punish him. But they accused him of having put some of his subjects to death, of having had several wives, &c. Things, for which he was not at all accountable to them; and what gave the finishing stroke to their extravagant injustice, they condemned him by the laws of Spain[a].

§ 56. How it is permitted to enter into the quarrel between a sovereign and his subjects.

But if the prince attacking the fundamental laws, gives his subjects a legal right to resist him; if tyranny becoming insupportable, obliges the nation to rise in their defence; every foreign power has a right to succour an oppressed people who implore their assistance. The English justly complained of James II. The nobility and the most distinguished patriots resolved to put a check on his enterprises, which manifestly tended to overthrow the constitution, and to destroy the liberties and the religion of the people, and therefore applied for assistance to the United Provinces. The authority of the Prince of Orange had, doubtless, an influence on the deliberations of the states-general; but it did not make them commit injustice: for when a people from good reasons take up arms against an oppressor, justice and generosity require, that brave men should be assisted in the defence of their liberties. Whenever therefore a civil war is kindled in a state,

[a] Garcillasso de la Vega.

foreign powers may aſſiſt that party which appears to them to have juſtice on their ſide. He who aſſiſts an odious tyrant; he who declares for an unjuſt and rebellious people, offends againſt his duty. When the bands of the political ſociety are broken, or at leaſt ſuſpended between the ſovereign and his people, they may then be conſidered as two diſtinct powers; and ſince each is independent of all foreign authority, nobody has a right to judge them. Either may be in the right, and each of thoſe who grant their aſſiſtance may believe that he ſupports a good cauſe. It follows then, in virtue of the voluntary law of nations (ſee Prelim. § 21.), that the two parties may act as having an equal right, and behave accordingly, till the deciſion of the affair.

But we ought not to abuſe this maxim for authorizing odious proceedings againſt the tranquillity of ſtates. It is a violation of the law of nations to perſuade thoſe ſubjects to revolt who actually obey their ſovereign, though they complain of his government.

The practice of nations is conformable to our maxims. When the German proteſtants came to the aſſiſtance of the reformed in France, the court never undertook to treat them otherwiſe than as common enemies, and according to the laws of war. France at the ſame time aſſiſted the Netherlands which took up arms againſt Spain, and did not pretend that her troops ſhould be conſidered upon any other footing than as auxiliaries in a regular war. But no power avoids complaining of an atrocious injury, if any one attempts by his emiſſaries to excite his ſubjects to revolt.

As to thoſe monſters who, under the title of ſovereigns, render themſelves the ſcourges and horror of the human race; theſe are ſavage beaſts, from which every brave man may juſtly purge the earth. All antiquity has praiſed Hercules for delivering the world from an Antæus, a Buſiris, and a Diomedes.

After

§ 57. The right of not ſuffering foreign powers to interfere in the affairs of government.

After having eſtabliſhed this truth, that foreign nations have no right to intrude themſelves into the government of an independent ſtate, it is not difficult to prove, that this ſtate has a right of refuſing to ſuffer it. To govern itſelf according to its pleaſure, is a neceſſary part of its independence. A ſovereign ſtate cannot be conſtrained in this reſpect, except it be from a particular right which the ſtate itſelf has given to others by treaties; and even in this caſe, in a ſubject of ſuch importance as that of government, this right cannot be extended beyond the clear and expreſs terms of the treaties. Without this circumſtance a ſovereign has a right to treat as enemies thoſe who endeavour to interfere, otherwiſe than by their good offices, in his domeſtic affairs.

§ 58. Of theſe rights with reſpect to religion.

Religion is in every ſenſe of great importance to a nation, and one of the moſt intereſting ſubjects on which the government can be employed. An independent people is, with reſpect to their religion, accountable to none but God; they have a right to conduct themſelves, in this reſpect, as in all others, according to the light of conſcience, and not to ſuffer any foreigner to interfere in an affair of ſo delicate a nature. The cuſtom long kept up in Chriſtendom of cauſing all the affairs of religion to be decided and regulated in a general council, could only be introduced by the ſingular circumſtance of the ſubmiſſion of the whole church to the ſame civil government, the Roman empire. When that empire was overthrown, and gave place to many independent kingdoms, this cuſtom was found contrary to the firſt elements of government, to the idea of independent ſtates, and political ſocieties. It was, however, long ſupported by prejudice, ignorance and ſuperſtition, by the authority of the popes, and the power of the clergy, and even reſpected at the time of the reformation. The ſtates who had embraced it, offered to ſubmit to the deciſions of an impartial council lawfully aſſembled. At preſent they boldly declare, that they depend on no power on earth, either with reſpect to religion

or

or civil government. The general and abſolute authority of the pope and council is abſurd in every other ſyſtem than that of thoſe popes who reſolved to make all Chriſtendom one ſingle body, of which they pretended to be the ſupreme head[a]. Thus even catholic ſovereigns have endeavoured to reſtrain this authority within ſuch limits as are conſiſtent with their ſupreme power; they do not receive the decrees of the councils and the popes bulls, till after they have cauſed them to be examined; and theſe eccleſiaſtical laws, are of no force in their dominions, without the conſent of the prince. We have ſufficiently eſtabliſhed in the firſt Book of this work, Chap. XII. the rights of a ſtate in matters of religion, and we refer to them here, only to draw juſt conſequences from them with reſpect to the conduct which nations ought to obſerve with regard to each other.

§ 59. No nation can be conſtrained with reſpect to religion.

It is then certain, that no one can interfere in oppoſition to the will of a nation, in its religious affairs, without violating its rights, and doing it an injury. Much leſs is any one allowed to employ force of arms to oblige it to receive a doctrine and a worſhip which he conſiders as divine. What right have men to proclaim themſelves the defenders and protectors of the cauſe of God? He always knows how, when he pleaſes, to lead the nations to the knowledge of himſelf, by more certain means than thoſe of violence. Perſecutors make no true converts. The monſtrous maxim of extending religion by the ſword, is a ſubverſion of the law of nations, and the moſt terrible ſcourge of kingdoms. Every madman believes he fights the cauſe of God, and every ambitious man covers himſelf with this pretence. While Charlemagne ſpread fire and ſword through Saxony, to plant Chriſtianity there, the ſucceſſors of Mahomet ravaged Aſia and Africa, to eſtabliſh the Koran.

[a] See above § 146. and Bodinus's Republic, Book I. Chap. IX. with his citations, p. m. 139.

But

§ 60. Of the office of humanity on the ſubject, of miſſionaries.

But it is an office of humanity to labour by mild and lawful means to perſuade a nation to receive a religion that is believed to be the only one that is true and ſalutary. Miſſionaries may be ſent to inſtruct the people, and this care is altogether conformable to the attention which every nation owes to the perfection and happineſs of others. But it muſt be obſerved, that not to do any injury to the rights of a ſovereign, the miſſionaries ought to abſtain from preaching clandeſtinely, or without his permiſſion, a new doctrine to his people. He may refuſe to allow them the liberty of diſcharging their office, and if he orders them to leave his dominions, they ought to obey. They have need of a very expreſs order from the King of kings for diſobeying lawfully a ſovereign who commands according to the extent of his power: and the prince who ſhall not be convinced of this extraordinary order of the Deity, will do no more than exert his authority, by puniſhing a miſſionary for diſobedience. But if the nation, or a conſiderable part of the people, are deſirous of keeping the miſſionary, and following his doctrine, we have eſtabliſhed elſewhere the rights of the nation, and thoſe of the citizens (Book I. § 128—136.): where this difficulty is fully anſwered.

§ 61. Circumſpection ought to be uſed.

The ſubject is very delicate, and we cannot authorize an inconſiderate zeal for making proſelytes, without endangering the tranquillity of all nations, and without expoſing, even thoſe who are engaged in making converts, to act inconſiſtently with their duty, at the very time when they believe they are accompliſhing the moſt meritorious work. For it is certainly performing a very bad office to a nation, and doing it an eſſential injury, to ſpread in the heart of it, a falſe and dangerous religion. Now there is no perſon who does not believe, that his religion alone is true and ſafe. Recommend, kindle in all hearts the ardent zeal of the miſſionaries, and you will ſee Europe overflowed with Lamas, Bonzes and Derviſes, while the monks of all kinds, will ſpread over Aſia and Africa;

Africa; proteſtant miniſters will defy the inquiſition in Spain and Italy, while the Jeſuits will ſpread themſelves among the proteſtants in order to bring them back into the pale of the church. Let the catholics reproach the proteſtants as much as they pleaſe with their lukewarmneſs, the conduct of the laſt is more agreeable to reaſon, and the law of nations. True zeal applies itſelf to the taſk of making a holy religion flouriſh in the countries where it is received, and of rendering it uſeful with reſpect to the manners of the people and to the ſtate; waiting the diſpoſitions of providence, for an invitation from foreign nations, or for a very evident divine miſſion to preach it abroad, while it finds employment enough in its own country. Let us add, that in order lawfully to undertake to preach a religion to the various people of the world, it is neceſſary that they ſhould be firſt informed of its truth by the moſt ſerious examination. But why! do Chriſtians doubt of their religion? The Mahometan entertains no doubt of his. Be always ready to take advantage of your knowledge, repreſent clearly, and with ſincerity, the principles of your belief, to thoſe who deſire to hear you, inſtruct, perſuade by evidence; but ſeek not to draw by the fire of enthuſiaſm; it is enough for each of us to act conſiſtenly with our own conſcience: do this and none will be refuſed the light, and a turbulent zeal will not trouble the peace of nations.

§. 62. What a ſovereign may do in favour of thoſe who profeſs his religion in another ſtate.

When a religion is perſecuted in one country, the foreign nations who profeſs it may intercede for their brethren: but this is all they can lawfully do, unleſs the perſecution be carried to an intolerable exceſs; then indeed it becomes a caſe of manifeſt tyranny, in which all nations are permitted to ſuccour an unhappy people (§ 56.). A regard to their own ſafety may alſo authorize them to undertake the defence of the perſecuted. A king of France replied to the embaſſadors who ſolicited him to ſuffer his reformed ſubjects to live in peace, that he was maſter in his kingdom. But the proteſtant ſovereigns who

who ſaw a conſpiracy of all the catholics obſtinately bent on their deſtruction, were alſo maſters with reſpect to the ſuccouring men who might ſtrengthen their party, and help them to preſerve themſelves from the ruin with which they were threatened. There is no longer any queſtion to be made in relation to the diſtinction between different ſtates and nations, when it is become neceſſary to unite againſt madmen, who would exterminate all thoſe who do not implicitly receive their doctrines.

CHAP. V.

Of the Obſervation of Juſtice, between Nations.

§ 63. The neceſſity of the obſervation of juſtice in human ſociety.

JUSTICE is the baſis of all ſociety, the ſure bond of all commerce. Human ſociety far from being an intercourſe of aſſiſtance and good offices, would be no longer any thing but a vaſt ſcene of robbery, if no reſpect was paid to this virtue, which ſecures every one in the poſſeſſion of his property. It is more neceſſary ſtill between nations, than between the individuals; becauſe injuſtice has more terrible conſequences in the quarrels of theſe powerful bodies politic, and it is more difficult to obtain redreſs. The obligation impoſed on all men to be juſt is eaſily ſhewn to be a law of nature: we ſuppoſe it here to be ſufficiently known, and content ourſelves with obſerving, that nations are not only obliged to perform it, (Prelim § 5.), but that it is ſtill more ſacred with reſpect to them, from the importance of its conſequences.

§ 64. The obligation of all nations to cultivate and obſerve juſtice.

All nations are then ſtrictly obliged to cultivate juſtice with reſpect to each other, to obſerve it ſcrupulouſly, and carefully to abſtain from every thing that may violate it. Every one ought to render to others what belongs to them, to reſpect their rights, and to leave them in the peaceable enjoyment of them.

From

§ 65. The right of not ſuffering injuſtice.

From this indiſpenſable obligation which nature impoſes on nations, as well as on all thoſe who are bound to practiſe it towards each other, reſults the right of every ſtate, not to ſuffer any of its privileges to be taken away, or any thing which lawfully belongs to it; for in oppoſing this, it acts in conformity to all its duties, and therein conſiſts the right (§ 49.).

§ 66. This right is perfect.

This right is perfect, that is, accompanied with the right of uſing force to make it obſerved. In vain would nature give us a right not to ſuffer injuſtice; in vain would it oblige others to be juſt with reſpect to us, if we could not lawfully make uſe of force, when they refuſed to diſcharge this duty. The juſt would be at the mercy of fraud and injuſtice, and all their rights would ſoon become uſeleſs.

§ 67. It produces 1. The right of defence.

From whence ariſes, as from ſo many branches, firſt, the right of a juſt defence, which belongs to every nation; or the right of making uſe of force againſt whoever attacks it, and its privileges. This is the foundation of a defenſive war.

§ 68. 2. The right of doing ourſelves juſtice.

Secondly, the right to obtain juſtice by force, if we cannot obtain it otherwiſe, or to purſue our right by force of arms. This is the foundation of an offenſive war.

§ 69. The right of puniſhing the unjuſt.

Known injuſtice is, doubtleſs, a ſpecies of injury. We have then a right to puniſh it, as we have ſhewn above, in ſpeaking of injuries in general (§ 52.). The right of not ſuffering injuſtice is a branch of the right of ſecurity.

§ 70. The right of all nations againſt one that openly deſpiſes juſtice.

Let us apply to the unjuſt, what we have ſaid above (§ 53.) of a miſchievous, or maleficent nation. If there be any that makes an open profeſſion of trampling juſtice under foot, of deſpiſing and violating the right of others, whenever it finds an opportunity, the intereſt of human ſociety will authorize all others to unite in order to humble and chaſtiſe it. We do not here forget the maxim eſtabliſhed in our preliminaries, that it does not belong to nations to uſurp the power of being judges of each other.

other. In particular caſes, liable to the leaſt doubt, it ought to be ſuppoſed, that each of the parties may have ſome right: and the injuſtice of that which has committed the injury, may proceed from error, and not from a general contempt of juſtice. But if by conſtant maxims, and by a continued conduct, one nation ſhews that it has evidently this pernicious diſpoſition, and that it conſiders no right as ſacred, the ſafety of the human race requires, that it ſhould be ſuppreſſed. To form and ſupport an unjuſt pretenſion is to do an injury, not only to him who is intereſted in his pretenſions but to mock at juſtice in general, and to injure all nations.

CHAP. VI.

Of the Concern a Nation may have in the Actions of its Citizens.

§ 71. The ſovereign ought to revenge the injuries of the ſtate, and to protect the citizens.

WE have ſeen in the preceding chapter, what are the duties common to nations with reſpect to each other, how they ought mutually to reſpect each other, and to abſtain from all injury, and all offence, and how juſtice and equity ought to reign among them in their whole conduct. But we have not hitherto conſidered the actions of the body of the nation, of the ſtate, of the ſovereign. Private perſons, who are the members of one nation, may offend and ill-treat the citizens of another, and may injure a foreign ſovereign: it is for us to examine, what ſhare a ſtate may have in the actions of its citizens, and what are the rights and obligations of ſovereigns in this reſpect.

Whoever offends the ſtate, injures its rights, diſturbs its tranquillity, or does it a prejudice in any manner whatſoever, declares himſelf its enemy, and puts himſelf in a ſituation to be juſtly puniſhed for it. Whoever uſes a citizen ill, indirectly offends the ſtate, which ought to protect this citizen, and his ſovereign ſhould revenge the injuries, puniſh the aggreſſor, and, if poſſible, oblige him to make intire ſatisfaction; ſince otherwiſe the citi-

zen

zen would not obtain the great end of the civil association, which is safety.

§ 72. He ought not to suffer his subjects to offend other nations or their citizens.

But on the other hand, the nation or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend the state itself. And that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries; but also because nations ought mutually to respect each other, to abstain from all offence, from all abuse, from all injury, and, in a word, from every thing that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation, than if he injured them himself. In short, the safety of the state, and that of human society, requires this attention from every sovereign. If you let loose the reins of your subjects against foreign nations, these will behave in the same manner to you; and instead of that friendly intercourse, which nature has established between all men, we should see nothing but one nation robbing another.

§ 73. We ought not to impute to a nation the faults of individuals.

However, as it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion, to the most exact obedience, it would be unjust to impute to the nation, or to the sovereign all the faults of the citizens. We ought not then to say in general, that we have received an injury from a nation, because we have received it from one of its members.

§ 74. Unless it approves or ratifies them.

But if a nation, or its leader, approves and ratifies the fact committed by a citizen, it makes the act its own: the offence ought then to be attributed to the nation, as the author of the true injury, of which the citizen is, perhaps, only the instrument.

If

§ 75. The conduct to be obſerved by the offended.

If the offended ſtate keeps the guilty in his power, he may, without difficulty, puniſh him, and oblige him to make ſatisfaction. If the guilty eſcape and returns into his own country, juſtice may be demanded from his ſovereign.

§ 76. The duty of the aggreſſor's ſovereign.

And ſince this laſt ought not to ſuffer his ſubjects to moleſt the ſubjects of others, or to do them an injury, much leſs ſhould he permit them audaciouſly to offend foreign powers: he ought to oblige the guilty to repair the damage, if that be poſſible, to inflict on him an exemplary puniſhment, or, in ſhort, according to the nature of the caſe, and the circumſtances attending it, to deliver him up to the offended ſtate, there to receive juſtice. This is pretty generally obſerved with reſpect to great crimes, or ſuch as are equally contrary to the laws, and the ſafety of all nations. Aſſaſſins, incendiaries and robbers, are ſeized every where, at the deſire of the ſovereign in the place where the crime was committed, and delivered up to his juſtice. They go ſtill farther in the ſtates that are more ſtrictly related by friendſhip and good neighbourhood: in the caſe of thoſe who commit common crimes they are proſecuted by the civil power, and obliged to make reparation, or to ſuffer a ſlight civil puniſhment; the ſubjects of two neighbouring ſtates are reciprocally obliged to appear before the magiſtrate of the place, where they are accuſed of having failed in their duty, upon a requiſition of that magiſtrate called Letters Rogatory, they are cited according to law, and obliged to appear before their own magiſtrates: an admirable inſtitution, from which many neighbouring ſtates live together in peace, and ſeem to form only one republic! This is in force throughout all Switzerland. As ſoon as the Letters Rogatory are prepared in form, the ſuperior of the accuſed ought to let them take effect; it is not for him to know whether the accuſation be true or falſe; he ought to preſume on the juſtice of his neighbour, and not to break by his diſtruſt, an inſtitution ſo proper to preſerve good harmony between them: however, if by conſtant

conſtant experience he finds that his ſubjects are diſturbed by the neighbouring magiſtrates, who call them before their tribunals, he is doubtleſs permitted to think of the protection he owes to his people, and to refuſe the rogatories till they have given him a reaſon for the abuſe, and intirely removed it. But he alſo is to alledge his reaſons, and to ſet them in a fair light.

§ 77. If he refuſes juſtice, he takes upon himſelf a ſhare of the fault and offence.

The ſovereign who refuſes to cauſe a reparation to be made of the damage cauſed by his ſubject, or to puniſh the guilty, or, in ſhort, to deliver him up, renders himſelf in ſome meaſure an accomplice in the injury, and becomes reſponſible for it. But if he delivers up, either the goods of the guilty, or makes a recompenſe, in caſes that will admit of reparation, or the perſon, to render him ſubject to the penalty of his crime, the offended has nothing farther to demand from him. King Demetrius having delivered to the Romans thoſe who had killed their ambaſſador, the ſenate ſent back, reſolving to reſerve to themſelves the liberty of puniſhing that crime by revenging it on the King himſelf, or on his dominions[d]. If this was really the caſe, and if the King had no ſhare in the aſſaſſination of the Roman embaſſador, the conduct of the ſenate was very unjuſt, and only worthy of men, who ſought a pretence to cover their ambitious enterpriſes.

§ 78. Another caſe in which the nation is guilty of the crimes of the citizens.

In ſhort, there is another caſe where the nation in general, is guilty of the baſe attempt of its members. This is when by its manners or the maxims of its government it accuſtoms, and authorizes its citizens to plunder, and uſe all foreigners indifferently, or to make inroads into the neighbouring countries, &c. Thus the nation of the Uſbecks is guilty of all the robberies committed by the individuals of which it is compoſed. The princes whoſe ſubjects are robbed and maſſacred, and whoſe lands are infeſted by theſe robbers, may juſtly puniſh

[d] See Polybius, quoted by Barbeyrac, in his notes on Grotius. Book III. Chap. XXIV. § VII.

niſh the entire nation. What do I ſay? all nations have a right to enter into a league againſt ſuch a people, to repreſs them, and to treat them as the common enemies of the human race. Chriſtian nations have no leſs a right to unite againſt the barbarous republics, in order to deſtroy thoſe haunts of pirates, among whom the love of plunder, or the fear of a juſt chaſtiſement, are the only rules of peace and war. But the corſairs have the prudence to reſpect thoſe who are moſt able to chaſtiſe them; and the nations who know how to enjoy freely a rich commerce, are not ſorry at its being out of the power of others.

CHAP. VII.

Of the Domain in regard to different Nations.

§ 79. General effect of the domain.

WE have explained in Chap. XVIII. Book I. how a nation poſſeſſes a country and occupies its domain and government. This country, with every thing included in it, becomes the property of the nation in general. Let us now ſee what are the effects of this property, with reſpect to other nations. The full domain is neceſſarily a proper and excluſive right: for if I have a full right to diſpoſe of a thing as I pleaſe, it follows from thence, that others have no right to it at all: ſince if they had any, I could not freely diſpoſe of it. The particular domain of the citizens may be limited and reſtrained ſeveral ways by the laws of the ſtate, as it always is by the eminent domain of the ſovereign; but the general domain of the nation is full and abſolute, ſince its authority over the land cannot be limited: it excludes all right on the part of ſtrangers. And as the rights of a nation ought to be reſpected by all others (§ 64.), none can pretend to any with reſpect to the country that belongs to that nation, nor ought to diſpoſe of it, without its conſent, any more than of every thing elſe contained in the country.

The

§ 80. What is comprehended in the domain of a nation.

The domain of the nation extends to every thing it poſſeſſes by a juſt title: it comprehends its ancient and original poſſeſſions and all its acquiſitions made by means juſt in themſelves, or received as ſuch by nations; conceſſions, purchaſes, conqueſts made in war carried on in form, &c. And by its poſſeſſions, we ought not only to underſtand its lands, but all the rights it enjoys.

§ 81. The goods of the citizens, are the goods of the nation, with reſpect to foreign nations.

The goods even of the individuals in their totality ought to be conſidered as the goods of the nation, in regard to other ſtates. They, in ſome ſort, really belong to it from the right it has over the goods of its citizens becauſe they make a part of ſum total of its riches, and augment its power; and becauſe the nation has an intereſt in the protection it owes to its members. In ſhort, it cannot be otherwiſe, ſince nations act and treat together in a body in their quality of political ſocieties, and are conſidered as ſo many moral perſons. All thoſe who form a ſociety, a nation, being conſidered by foreign ſtates, as making only one whole, one ſingle perſon; all their wealth together can only be conſidered as the wealth of that ſame perſon. And this is ſo true, that each political ſociety may, if it pleaſes, eſtabliſh a community of goods, as Campanella did in his republic of the ſun. Others will not inquire, what it does in this reſpect: its domeſtic regulations make no change in its rights with reſpect to ſtrangers, nor in the manner in which they ought to conſider the totality of its goods in what way ſoever they are poſſeſſed.

§ 82. A conſequence of this principle.

From an immediate conſequence of this principle, if a nation has a right to any part of the goods of another, it has a right indifferently to the goods of the citizens of that part, till the diſcharge of the obligation. This maxim is of great uſe, as ſhall be afterwards ſhewn.

§ 83. The connection of the domain of the nation with the ſovereignty.

The general domain of the nation over the lands it inhabits is naturally connected with the empire: for in eſtabliſhing itſelf in a vacant country, the nation, certainly, did not pretend to have the leaſt dependence there on

on any other power: and how should an independent nation avoid having authority at home? Thus we have already observed (Book I. § 265.) that in possessing a country the nation is presumed to possess at the same time its government. We shall here proceed farther, and shew the natural connection of these two rights in an independent nation. How should it govern itself at its pleasure in the country it inhabits, if it cannot truly and absolutely dispose of it? and how should it have the full and absolute domain of the place in which it has no command? Another's sovereignty, and the rights it comprehends, must take away its freedom of disposal. Add to this, the eminent domain which constitutes a part of its sovereignty (Book I. § 244.) and you will the better perceive the intimate connection there is between the domain and the empire of the nation. Thus what is called the *high domain*, which is nothing but the domain of the body of the nation, or of the sovereign who represents it, is every where considered as inseparable from the sovereignty. The *useful domain*, or the domain reduced to the rights that may belong to a particular person in the state, may be separated from the empire: and nothing prevents the possibility of its belonging to a nation, in places that are not under its obedience. Thus many sovereigns have fiefs, and other properties, in the lands of another prince: they therefore possess them in the manner of individuals.

§ 84. Of Jurisdiction.

The empire united to the domain, establishes the jurisdiction of the nation in its territories, or the country that belongs to it. It is that, or its sovereign, who is to exercise justice in all the places under his obedience, to take cognizance of the crimes committed, and the differences that arise in the country.

Other nations ought to respect this right. And as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just,

and executed as ſuch: as ſoon as a cauſe in which foreigners find themſelves intereſted, has been decided in form, the ſovereign of the defendants cannot hear their complaints. To undertake to examine the juſtice of a definitive ſentence, is to attack the juriſdiction of him who has paſt it. The prince ought not then to interfere in the cauſes of his ſubjects in foreign countries, and to grant them his protection, excepting in the caſes of a refuſal of juſtice, palpable and evident injuſtice, a manifeſt violation of rules and forms; or, in ſhort, an odious diſtinction made to the prejudice of his ſubjects, or of foreigners in general. The court of England has eſtabliſhed this maxim, with great ſtrength of evidence, on occaſion of the Pruſſian veſſels ſeized and declared good prizes during the laſt war[a]. What is here ſaid has no relation to the merit of that particular cauſe, ſince it depended on facts.

§ 85. Effects of the juriſdiction in foreign countries.

In conſequence of theſe rights of juriſdiction, the deciſions made by the judge of the place within the extent of his power, ought to be reſpected, and to be in force among foreigners. For example, the judge of the domicil is to nominate tutors and guardians for minors and idiots. The law of nations which has an eye to the common advantage and the good harmony of nations, will then have this nomination of a tutor or guardian be valid and acknowledged in all countries where the pupil may have any concern. Uſe was made of this maxim in the year 1672, even with reſpect to a ſovereign. The Abbé of Orleans, Sovereign Prince of Neufchatel in Switzerland, being incapable of managing his own affairs, the King of France gave him for a guardian, his mother the Ducheſs Dowager of Longueville. The Ducheſs of Nemours, the ſiſter of that prince, pretended to the guardianſhip for the principality of Neufchatel: but the

[a] See the report made to the King of Great Britain by Sir George Lee, Dr. Paul, Sir Dudley Ryder, and Mr. Murray. This is an excellent piece on the law of nations.

title

title of the Ducheſs of Longueville was acknowledged by the three ſtates of the country. Her advocate founded her right on that princeſs's being eſtabliſhed guardian by the judge of the place [a]. This was applying a juſt principle very ill: the domicil of the prince could be no where but in his ſtate, and the authority of the Ducheſs of Longueville became firm and lawful at Neufchatel, only by the decree of the three ſtates who alone had a right to chuſe a guardian for their ſovereign.

In the ſame manner the validity of a teſtament, as to its form, can only be decided by the judge of the domicil, whoſe ſentence delivered in form ought to be every where acknowledged. But without affecting the validity of the teſtament itſelf, the bequeſts contained in it, may be diſputed before the judge of the place where the effects are ſituated, becauſe thoſe effects can only be diſpoſed of conformably to the laws of the country. Thus the ſame Abbé of Orleans we have juſt mentioned, having appointed the Prince of Conti his univerſal legatee, the three ſtates of Neufchatel gave the inveſtiture of the principality to the Ducheſs of Nemours, without ſtaying till the parliament of Paris had pronounced their deciſion on the queſtion of two teſtaments oppoſed to that of the Abbé of Orleans: declaring that the ſovereignty was unalienable. Beſides, it might ſtill be ſaid on this occaſion, that the domicil of the prince could be no where but in the ſtate.

§ 86. Of deſerts and uncultivated places.

Every thing included in the country belong to the nation and nobody beſides itſelf, or he to whom it has devolved its right, being able to diſpoſe of it (§. 79.); if it has left uncultivated and deſert places in the country, no perſon whatſoever has a right to take poſſeſſion of them without its conſent. Though it does not make actual uſe of them, theſe places belong to it, it has an intereſt in preſerving them for future uſe, and ought not to be accountable to any perſon for the manner in which it makes

[a] Memoirs of Mad. the Ducheſs of Longueville. 167c.

uſe of its property. 'Tis proper to recollect here, what we have obſerved above (Book I. § 81.): no nation can lawfully appropriate to itſelf a too diſproportioned extenſive country, and reduce other nations to want ſubſiſtence, and a place of abode. A German chief in the time of Nero ſaid to the Romans, "As heaven belongs to the "gods, ſo the earth is given to the human race: deſert "countries are common to all[b]:" by which he would let his proud conquerors know, that they had no right to reſerve and appropriate to themſelves a country which they left deſert. The Romans had laid waſte a chain of countries along the Rhine to cover their provinces from the incurſions of the barbarians. This German's remonſtrance would have had a good foundation, had the Romans pretended to keep without reaſon a vaſt country which was of no uſe to them: but theſe lands which they would not ſuffer to be inhabited, ſerving as a rampart againſt ſavage nations, were of extraordinary uſe to the empire.

§ 87. The duty of the nation in this reſpect.

When there is not this ſingular circumſtance, it is equally agreeable to the dictates of humanity, and to the particular advantage of the ſtate, to give theſe deſert places to ſtrangers who are willing to clear the land and to render it valuable. The beneficence of the ſtate thus turns to its own advantage, it acquires new ſubjects, and augments its riches and power. This is the practice in America; and by this wiſe method, the Engliſh have carried their ſettlements in the New World to a degree of power, which has conſiderably increaſed that of the nation. Thus the King of Pruſſia alſo, endeavours to re-people his eſtates laid waſte by the calamities of antient wars.

§ 88. Of the right of poſſeſſing things that have not yet found a maſter.

The nation that poſſeſſes a country is at liberty to leave in the primitive communion certain things that have not yet had a maſter, or of appropriating to itſelf the right of poſſeſſing theſe things, as well as any other advantage

[b] *Sicut Cœlum Dîis, ita terras generi mortalium datas; quæque vacuæ, ea publicas eſſe.* Tacit.

for

for which that country is convenient. And as such a right is of use, it is, doubtless, presumed, that the nation reserves it to itself. It belongs to it then, to the exclusion of strangers, unless its laws expressly declare otherwise, as those of the Romans, which left wild beasts, fish, &c. in the primitive communion. No foreigner has then a natural right to hunt, or fish, in the territories of the state, to appropriate to himself a treasure found there, &c.

§ 89. Rights granted to other nations.

Nothing hinders a nation, or sovereign, if the laws permit, to have the power of granting several privileges in his territories to another nation, or in general to strangers; every one being able to dispose of his property, as he thinks proper. Thus several sovereigns in the Indies have granted to the trading nations of Europe the right of having factories, forts, and even fortresses and garrisons in places within their dominions. We may in the same manner give the right of fishing in a river, or on the coast, that of hunting in the forests, &c. and when once these rights have been validly ceded, they constitute a part of the possessions of him who has acquired them, and ought to be respected in the same manner as his antient possessions.

§ 90. It is not allowable to drive a nation out of a country which it inhabits.

Whoever agrees that robbery is a crime, and that we are not allowed to seize by force the goods of another, will acknowledge, without any other proof, that no nation has a right to chase another people from the country they inhabit, in order to settle in it themselves: for notwithstanding the extreme inequality to be found in climates and lands, every people ought to be contented with that which is fallen to their share. Will the conductors of nations despise a rule that constitutes all their safety in civil society? Let this sacred rule be intirely forgotten, and the peasant will quit his thatched cottage to invade the palaces of the great, or the delightful possessions of the rich. The antient Helvetians, discontented with their native soil, burnt all their habitations, and marched forward, sword in hand to settle in the fertile countries on the

the ſouth of Gaul. But they received a terrible leſſon from a conqueror more able, and ſtill leſs juſt than they: Cæſar defeated them, and ſent them back into their own country. Their poſterity, however, more wiſe than they, confined their views to the preſervation of the lands, and the independence they had received from nature; they lived contented, and the labour of free hands counter-balanced the ſterility of the ſoil.

§ 91. Nor extend by violence the bounds of empire.

There are conquerors who aſpiring after nothing but enlarging the bounds of their dominions, without driving out the inhabitants from the country, content themſelves with ſubduing them: a violence leſs barbarous, but not leſs unjuſt: in ſparing the wealth of the individuals, they ſeize all the rights of the nation, and the ſovereign.

§ 92. The limits of territories ought to be carefully ſettled.

Since the leaſt uſurpation over the territory of another is an injuſtice; in order to avoid being expoſed to it, and to prevent every ſubject of diſcord, every occaſion of quarrel, the limits of territories ought to be marked out with clearneſs and preciſion. If thoſe who drew up the treaty of Utrecht had applied on ſo important a ſubject, all the attention it deſerved, we ſhould not ſee France and England in arms, in order to decide by a bloody war what are the bounds of their poſſeſſions in America: but ſome obſcurity, ſome uncertainty, is often deſignedly left in conventions to furniſh the means of a rupture. An unworthy artifice in a tranſaction wherein good faith alone ought to preſide! We have alſo ſeen commiſſaries endeavour to ſurpriſe or corrupt thoſe of a neighbouring ſtate unjuſtly to gain for their maſter ſome leagues of territory. How can princes or miniſters allow themſelves in practices that would diſhonour a private man?

§ 93. Of the violation of territory.

They ought not only to be far from uſurping the territory of another, they ſhould alſo reſpect it, and abſtain from every act contrary to the rights of the ſovereign: for a foreign nation can claim no right to it (§ 79). They cannot then, without doing an injury to the ſtate,

enter

enter ſword in hand into his territories in purſuit of a criminal, and take him from thence. This is at the ſame time injuring the ſafety of the ſtate, and offending againſt the rights of the empire, or the ſupreme authority of the ſovereign. This is what is called a violation of territory; and among nations there is nothing more generally acknowledged as an injury that ought to be repelled with vigour, by every ſtate that would not ſuffer itſelf to be oppreſſed. We ſhall make uſe of this principle in ſpeaking of war, which gives occaſion for many queſtions on the rights of territory.

§ 94. Of the prohibition to enter the territory.

The ſovereign may forbid the entrance of his territory either in general, to every ſtranger, or in a particular caſe, or to certain perſons, or on account of certain affairs, according as he ſhall find it moſt for the advantage of the ſtate. There is nothing in all this, that does not flow from the rights of the domain and the empire: every one is obliged to pay a reſpect to the prohibition, and he who dares to violate it, incurs the penalty decreed to render it effectual. But the prohibition ought to be known, as well as the penalty annexed to the diſobedience; thoſe who are ignorant of it, ought to be informed when they make their appearance, in order to enter the country. Formerly the Chineſe, fearing leſt the commerce of ſtrangers ſhould corrupt the manners of the nation, and make an alteration in the maxims of a wiſe, but ſingular government, forbad all people entering the empire: a prohibition that was not at all inconſiſtent with juſtice, provided they did not refuſe the ſuccour required by humanity, to thoſe whom a tempeſt or ſome neceſſity obliged to appear on their frontiers. It was ſalutary to the nation without injuring the rights of others, or even the duties of humanity which permit us, in caſe of competition, to prefer ourſelves to others.

§ 95. Of a land poſſeſſed by ſeveral nations at the ſame time.

If two or many nations diſcover, and poſſeſs at the ſame time, an iſland, or any other deſert land without a maſter, they ought to agree between themſelves and make an

an equitable partition; but if they cannot agree, each will have the right of empire, and domain of the parts in which they first ſettled.

§ 96. Of a land poſſeſſed by a private perſon.

An independent private perſon, whether he has been driven from his country, or whether he has legally quitted it of himſelf, may ſettle in a country which he finds without a maſter, and there poſſeſs an independent domain. Whoever would afterwards make himſelf maſter of the intire country, could not do it with juſtice without reſpecting the rights and independence of his perſon. But if he himſelf finds a ſufficient number of men who are willing to live under his laws, he may form a new ſtate within the country he has diſcovered, and poſſeſs there both the domain and the empire. But if this private perſon arrogates to himſelf alone an excluſive right to a country in order to be a monarch there without ſubjects, people will juſtly laugh at his vain pretenſions: a fooliſh and ridiculous poſſeſſion can produce no real right.

There are alſo other means by which a private perſon may found a new ſtate. Thus in the eleventh century, ſome gentlemen of Normandy founded a new empire in Sicily, after having conquered it from the common enemies of Chriſtendom. The cuſtom of the nation permitted the citizens to quit their country, in order to ſeek their fortune elſewhere.

§ 97. Independent families in a country.

When many independent families are ſettled in a country, they poſſeſs the free domain, but without empire, ſince they do not form a political ſociety. Nobody can ſeize the empire of this country: ſince this would be to make theſe families ſubjects in ſpite of themſelves, and no man has a right to command men who are free born if they do not voluntary ſubmit to him.

If theſe families have fixed ſettlements, the place each poſſeſſes properly belongs to that family: the reſt of the country, of which they make no uſe, being left in the primitive communion, belongs to the firſt poſſeſſor. Whoever would ſettle there, may lawfully take poſſeſſion of it.

Families

Families wandering in a country, as the nations of shepherds who pass over it, according as their wants require, possess it in common; it belongs to them exclusively of all other nations, and we cannot without injustice deprive them of the countries that are appropriated to their use. But let us here recollect what we have said more than once (Book I. § 81, and 209. Book II. § 85.): the Indians of North America had no right to appropriate all that vast continent to themselves; and provided that people are not reduced to want land, others might, without injustice, settle in some parts of a region which they were not in a condition to inhabit intirely. If the Arabian shepherds resolved carefully to cultivate the land, a less space might be sufficient for them. In the mean time no other nation has a right to reduce their bounds, unless it be under an absolute want of land. For, in fine, they possess their country, they make use of it after their manner, they reap from it an advantage suitable to their manner of life, and in which they receive laws from no one. In a case of pressing necessity, I think, people may, without injustice, settle in a part of this country, on teaching the Arabs the means of rendering it, by the cultivation of the earth, sufficient for their wants, and those of the new inhabitants.

§ 98. Possession of certain places only, or of certain rights in a vacant country.

It may happen that a nation may be contented with possessing only certain places, or appropriating to itself certain rights in a country that has not a master, and be little desirous of possessing the whole country. In this case, another may take what the first has neglected; but this cannot be done without allowing them an intire and absolute independence with respect to all the rights acquired by the first. In this case it is proper that a regulation should be made by a convention, and this is seldom omitted among civilized nations.

CHAP.

CHAP. VIII.

Rules with respect to Foreigners.

§ 99. The general idea of the conduct the state ought to have towards strangers.

WE have already treated (Book I. § 213.) of the inhabitants, or of the men who reside in a country where they are not citizens. We shall only treat here of the strangers who pass or sojourn in a country for the management of their affairs, or in quality of mere travellers. The relation that subsists between them and the society in which they are found, the ends for which they travel and reside there, the duties of humanity, the rights, the interest, and the safety of the state which receives them, the rights of that to which they belong; all these circumstances, combined and applied according to cases and circumstances, serve to determine the conduct that ought to be observed towards them, which constitutes right and duty, with regard to them. But the intention of this chapter is not so much to shew, what humanity and justice require towards strangers, as to establish the rules of the law of nations on this subject; rules tending to secure the rights of each, and to hinder the repose of nations being disturbed by the quarrels of individuals.

§ 100 Of the entering the territory.

Since the lord of the territory may forbid its being entered when he thinks proper (§ 94.), he has, doubtless, a power to make the conditions on which he will admit of it. This, as we have already said, is a consequence of the right of domain. Can it be necessary to add, that the master of the territory ought here to respect the duties of humanity? 'Tis the same with respect to all rights; the proprietor may freely use them, and he does no injury to any person by making use of them; but if he would be free from all guilt and keep his conscience pure, he will never make any other use of them but such as is most conformable to his duty. We speak here in general of the rights which belong to the lord of the country, reserving

reſerving for the following chapter the examination of the caſes in which he cannot refuſe an entrance into his territory; and we ſhall ſee in Chap. X. how his duty towards all mankind on other occaſions obliges him to permit the paſſage into, and a reſidence in, his ſtate.

If the ſovereign annexes ſome particular conditions to the permiſſion of entering into his territories, it ought to be done in ſuch a manner, that ſtrangers may be informed of it, when they preſent themſelves on the frontier. There are ſtates, as China, and Japan, into which all foreigners are forbid to penetrate, without an expreſs permiſſion: but in Europe the acceſs is every where free to every perſon who is not an enemy of the ſtate, except in ſome countries to vagabonds.

§ 101. Strangers are ſubject to the laws.

But even in the countries where every ſtranger freely enters, the ſovereign is ſuppoſed to allow him acceſs, only upon this tacit condition, that he be ſubject to the laws; I mean the general laws made to maintain good order, and which have no relation to the title of citizen, or of ſubject of the ſtate. The public ſafety, the rights of the nation, and of the prince, neceſſarily require this condition; and the ſtranger tacitly ſubmits to it, as ſoon as he enters the country, as he cannot preſume on having acceſs upon any other footing. The empire has the right of command in the whole country, and the laws are not confined to regulating the conduct of the citizens among themſelves; but they determine what ought to be obſerved by all orders of people throughout the whole extent of the ſtate.

§ 102. And puniſhable according to the laws.

In virtue of this ſubmiſſion, the ſtrangers who commit a fault, ought to be puniſhed according to the laws of the country. The end of pains and penalties is to render the laws reſpected, and to maintain order and ſafety.

§ 103. Who is the judge of their diſputes.

From the ſame reaſon, the diſpute that may ariſe between the ſtrangers, or between a ſtranger and a citizen, ought to be terminated by the judge of the place, and alſo according to the laws of the place. And as the diſpute properly

properly arises from the refusal of the defendant, who pretends not to owe what is demanded of him; it follows from the same principle, that every defendant ought to be prosecuted before his judge, who alone has a right to constrain or condemn him. The Swiss have wisely made this rule one of the articles of their alliance, in order to prevent the quarrels that might arise from abuses that were formerly too frequent in relation to this subject. The defendant's judge, is the judge of the place where this defendant has his domicil, or that of the place where the defendant is, when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In this last case, as these possessions ought to be enjoyed according to the laws of the country where they are situated, and as the right of granting the possessions is vested in the superior of the country, the disputes relating to them can only be decided in the state on which they depend.

We have already shewn in (§ 84.), how the jurisdiction of a nation ought to be respected by the other sovereigns, and in what cases only, they may interfere in the causes of their subjects, in foreign countries.

§ 104. The protection due to strangers.

The sovereign ought not to grant an entrance into his state to make strangers fall into a snare: as soon as he receives them, he engages to protect them as his own subjects, and to make them enjoy, as much as depends on him, an intire security. Thus we see that every sovereign who has given an asylum to a stranger, considers himself no less offended by an injury that may be done to him, than he would be by an act of violence committed on his own subject. Hospitality was in great honour among the antients, and even among barbarous nations, such as the Germans. Those savage people who treated strangers ill, that Scythian nation which sacrificed them to Diana[a]

[a] The Taurians, see *Grotius de jure belli & pacis, Lib.* II. *Cap.* XX. *n.* 7. § XL.

were

were held in abhorrence by all nations, and Grotius justly says [b] that their extreme ferocity cut them off from human society. All other nations had a right to unite their forces in order to chastize them.

§ 105. The duties of a stranger.

From a sense of gratitude for the protection granted him, and the other advantages he enjoys, the stranger ought not to confine himself to the respect due to the laws of the country, he ought to assist it upon occasion, and to contribute to its defence, as much as his being a citizen of another state may permit him. We shall see elsewhere what he can, and ought to do, when the country is engaged in war. But nothing hinders his defending it against pyrates or robbers; against the ravages of an inundation, or the devastation of fire. Can he pretend to live under the protection of a state and to participate in a multitude of advantages, without doing any thing for its defence, and to be a tranquil spectator of the dangers to which the citizens are exposed?

§ 106. To what taxes he is subject.

Indeed he cannot be subject to the taxes that have only a relation to the citizens; but he ought to contribute his share to all the others. Being exempted from serving in the militia and the tribute destined for the support of the rights of the nation he will pay the duties imposed upon provisions, merchandize, &c. and, in a word, every thing that has only a relation to his residence in the country, or to the affairs which brought him thither.

§ 107. Strangers continue members of their own nation.

The citizen or the subject of a state who absents himself for a time without any intention to abandon the society of which he is a member, does not lose his privilege by his absence: he preserves his rights, and remains bound by the same obligations. Being received in a foreign country, in virtue of the natural society, the communication, and commerce, which nations are obliged to cultivate with each other (Prelim. § 11 and 12. Book II. § 21.), he ought to be considered there, as a member of his own nation, and treated as such.

[b] Ibid.

The

§ 108. The ſtate has no right over the perſon of a ſtranger.

The ſtate, which ought to reſpect the rights of other nations, and in general thoſe of all mankind, cannot arrogate to itſelf any power over the perſon of a ſtranger, who does not become a ſubject by entering into the territory. The ſtranger cannot pretend to enjoy the liberty of living in the country without reſpecting the laws; if he violates them, he is puniſhable as the diſturber of the public peace, and being guilty with reſpect to ſociety; but he is not obliged to ſubmit, like the ſubjects, to all the commands of the ſovereign: but if ſuch things are required from him as he is not willing to perform, he may quit the country. Free at all times to leave it, the people have no right to detain him, except for a time, and from very particular reaſons, as in a time of war, from the fear, leſt knowing the ſtate of the country, and the ſtrong places, he ſhould communicate his knowledge to the enemy. From the voyages of the Dutch to the Eaſt-Indies we learn, tha the Kings of Corea forcibly detained the ſtrangers who were ſhip-wrecked on their coaſt; and Bodinus aſſures us [c], that a cuſtom ſo contrary to the law of nations was practiſed in his time in Æthiopia, and even in Muſcovy. This is wounding both the rights of private perſons and thoſe of the ſtate to which they belong. Things have been greatly changed in Ruſſia; a ſingle reign, that of Peter the Great, has placed that vaſt empire in the rank of civilized nations.

§ 109. Nor of his wealth.

The property of an individual does not ceaſe to belong to him on account of his being in a foreign country, and it ſtill is a part of the totality of the wealth of his nation (§ 81.). The pretenſions which the lord of the territory might form in reſpect to the wealth of a foreigner would be then equally contrary to the rights of the proprietor, and to thoſe of the nation of which he is a member.

§ 110. Who are the heirs of a ſtranger.

Since the ſtranger remains ſtill a citizen of his country, and a member of his own nation (§ 107.); the

[c] In his Republic, Book. I. Chap. VI.

wealth

wealth he leaves at his death in a foreign country ought naturally to devolve to thoſe who are his heirs according to the laws of the ſtate of which he was a member. But this general rule does not prevent the immoveable effects following the diſpoſition of the laws of the country where they are ſituated (ſee § 103).

§ 111. Of the teſtament of a foreigner.

As the right of bequeathing by will, or of diſpoſing of his fortune, in caſe of death, is a right reſulting from property; it cannot, without injuſtice, be taken from a ſtranger. The ſtranger has then by natural right the liberty of making a will. But it is aſked by what laws he is obliged to regulate himſelf either in the form of his teſtament or in the diſpoſal of his property? 1. As to the form or ſolemnities appointed to ſettle the validity of a will, it appears that the teſtator ought to obſerve thoſe that are eſtabliſhed in the country where it is written, unleſs the laws of the ſtate of which he is a member, otherwiſe ordain; in every caſe he will be obliged to follow the formalities the laws preſcribe, if he would, with validity, diſpoſe of the wealth he poſſeſſes in his own country. I ſpeak here of a teſtament to be opened in the place where the perſon dies; for if a traveller makes his will, and ſends it ſealed up into his own country, it is the ſame as if it had been written there, and ought to follow the laws of it. 2. As to the bequeſts themſelves, we have already obſerved, that thoſe which relate to immoveables ought to be conformable to the laws of the country where thoſe immoveables are ſituated. The foreign teſtator cannot diſpoſe of the goods moveable or immoveable which he poſſeſſes in his own country, otherwiſe than in a manner conformable to the laws of the ſame country. But as to moveable goods, ſpecie, and other effects which he poſſeſſes elſewhere, which he has with him, or which follow his perſon, we ought to diſtinguiſh between the local laws, that do not extend beyond the territory, and the laws that have a relation to the rank of a citizen. The ſtranger remaining a citizen of his country, he is always bound by theſe

theſe laſt laws, wherever his is placed, and he ought to conform to them in the diſpoſal of his natural goods, and all his moveables whatſoever. The laws of this kind made in the country where he is placed, and of which he is not a citizen, are of no force with reſpect to him. Thus a man who makes his will and dies in a foreign country, cannot deprive his widow of the part of his moveable effects aſſigned to that widow by the laws of the country. A Geneveſe obliged by the law of Geneva to leave a portion to his brothers or his couſins, if they are his next heirs, cannot deprive them of it by making his will in a foreign country, while he remains a citizen of Geneva: but the ſtranger dying at Geneva, is not obliged, in this reſpect, to conform to the laws of the republic. The caſe is quite otherwiſe with reſpect to local laws: they regulate what may be done in the territory, and do not extend beyond it. The teſtator is no longer ſubject to them when he is out of the territory, and they do not affect that part of his wealth which is alſo out of it. The ſtranger is obliged to obſerve theſe laws in the country where he makes his will, with reſpect to the goods he poſſeſſes there. Thus an inhabitant of Neufchatel, to whom intails are forbidden, in his country, with reſpect to the goods he poſſeſſes there, freely makes an intail of the eſtate he poſſeſſes out of the juriſdiction of the country, if he dies in a place where intails are allowed; and a foreigner making a will at Neufchatel could not make an intail of even the moveable goods he poſſeſſes there; if we might not always ſay, that his moveable goods are excepted by the ſpirit of the law.

§ 112. Of the right of Eſcheatage.

What we have eſtabliſhed in the three preceding ſections, is ſufficient to ſhew, with how little juſtice the treaſury, in ſome ſtates, lays claim to the effects left there by a foreigner at his death. This practice is founded on what is called the right of *Eſcheatage*, by which foreigners are excluded from all inheritances in the ſtate, either with

with reſpect to the goods of a citizen or to thoſe of an alien, and therefore they cannot be conſtituted heirs by will, nor receive any legacy. Grotius juſtly obſerves, that this law was made in the ages when foreigners were almoſt conſidered as enemies [b]. When even the Romans were become a very polite and learned people, they could not accuſtom themſelves to conſider foreigners as men who had a right to the ſame privileges as they themſelves enjoyed. "The people, ſaid Pomponius the civilian, with whom we have neither "friendſhip, nor hoſpitality, nor alliance, are not "our enemies: yet if the things that belong to us "fall into their poſſeſſion and they are the pro-"prietors of them, freemen become their ſlaves; and "the are on the ſame terms with reſpect to us [c]." We muſt believe that ſo wiſe a people only preſerved ſuch inhuman laws from a neceſſary retaliation, as they could have no other reaſon for it, from barbarous nations with whom they had no connection nor any treaty. Bodinus ſhews [d] that the rights of *Eſcheatage* are derived from theſe worthy ſources. The emperor Frederic II. firſt aboliſhed it by an edict, which permitted *all foreigners dying within the limits of the empire to diſpoſe of their ſubſtance by teſtament, or if they died inteſtate to have their neareſt relations for heirs* [e]. But Bodinus complains that this edict was but badly executed. Why does there ſtill remain any veſtiges of ſo barbarous a law in Europe, which is now ſo enlightened and ſo full of humanity? The law of nature cannot ſuffer it to be put in practice, but by way of retaliation. This is the uſe made of it by the king of Poland in his hereditary ſtates: the right of *eſcheatage* is eſtabliſhed in Saxony: but the ſovereign is ſo juſt and equitable, that he makes uſe of it only againſt the nations that conſider the Saxons as ſubject to them.

[b] *De jure belli & pacis, Lib* II. Cap. VI. § 14.

[c] *Digeſt. Lib* XLIX. *Tit.* XV. *De Captivis & Poſtimin.* I make uſe of the Preſident de Monteſquieu's Tranſlation in his Spirit of Laws.

[d] His Republic, Book I. Chap. VI.

[e] Ibid.

§ 113. The right of foreign duties.

The right of foreign duties is more conformable to juſtice, and the mutual obligation of nations. We give this name to the right by virtue of which the ſovereign retains a moderate part of the goods either of the citizens or foreigners ſent out of his territories to paſs into the hand of ſtrangers. As the carrying away of theſe goods is a loſs to the ſtate, it may juſtly receive an equitable recompenſe.

§ 114. Of immoveables poſſeſſed by an alien.

Every ſtate has the liberty of granting or refuſing foreigners the power of poſſeſſing lands or other immoveable goods within its territory. If it grants them theſe privileges, theſe kind of poſſeſſions belonging to foreigners, remain ſubject to the juriſdiction, and the laws of the country, and to the ſame taxes as the reſt. The government of the ſovereign extends over the whole territory, and it would be abſurd to except ſome parts from it, on account of their being poſſeſſed by foreigners. If the ſovereign does not permit aliens to poſſeſs immoveables, nobody has a right to complain of it; for he may have very good reaſons for acting in this manner, and ſtrangers not being able to claim any right in his territories (§ 79.), they ought not to take it ill, that he makes uſe of his power and of his rights in the manner which he thinks moſt for the advantage of the ſtate. And as the ſovereign my refuſe ſtrangers the power of poſſeſſing immoveables, he is doubtleſs at liberty to grant it only on certain conditions.

§ 115. Marriages of aliens.

Nothing naturally hinders foreigners contracting marriage in the ſtate. But if theſe marriages are found prejudicial or dangerous to a nation, it has a right, and it is even obliged to prohibit them, or to annex the permiſſion of them to certain conditions; and as it belongs to the nation or its ſovereign to determine what appears moſt for the welfare of the ſtate, other nations ought to acquieſce in what is in this reſpect appointed in a ſovereign ſtate. Citizens are almoſt every where forbid to marry foreigners of a different religion; and in many places

places of Switzerland a citizen cannot marry a foreign woman, unleſs he proves that ſhe brings him in marriage a certain ſum fixed by the law.

CHAP. IX.

Of the Rights which belong to all Nations after the Introduction of Domain and Property.

§ 116. What are the rights of which men cannot be deprived.

IF obligation, as we have obſerved, gives a right to the things without which it cannot be fulfilled; every abſolute, neceſſary, and indiſpenſable obligation produces in this manner rights equally abſolute, neceſſary, and that cannot be taken away. Nature impoſes no obligations on men, without giving them the means of fulfilling them. They have an abſolute right to the neceſſary uſe of theſe means: nothing can deprive them of this right, as nothing can diſpenſe with their fulfilling their natural obligations.

§ 117. Of the right which remains of the primitive communion.

In the primitive communion, men had, without diſtinction, a right to the uſe of every thing, ſo far as it was neceſſary to diſcharge their natural obligations. And as nothing could deprive them of this right, the introduction of domain and property could not take place without leaving to every man the neceſſary uſe of things; that is, the uſe abſolutely required for the accompliſhment of his natural obligations. We cannot then ſuppoſe them introduced without this tacit reſtriction, that every man preſerves ſome right to the things ſubjected to property in the caſe where, without this right he would remain abſolutely deprived of the neceſſary uſe of things of this nature. This right is then a neceſſary remainder of the primitive communion.

§ 118. Of the right which remains to each nation with reſpect to what belongs to others.

The domain of nations does not then hinder every one having ſome right to that which belongs to others in caſes where they find themſelves deprived of the neceſſary uſe of certain things, if the property of others abſolutely exclude them. We ought carefully to weigh all the cir-

cumſtances in order to make a juſt application of this principle.

§ 119. Of the right of neceſſity.

I ſay the ſame of the *right of neceſſity*. We thus call the right which neceſſity alone gives to the performance of certain actions that are otherwiſe unlawful, when without theſe actions it is impoſſible to fulfil an indiſpenſable obligation. We ought to take great care, in this caſe, that the obligation be really indiſpenſable, and the act relating to it, the only means of fulfilling this obligation. If either of theſe conditions are wanting, there is no right of neceſſity. We may ſee the ſubjects diſcuſſed in treatiſes on the law of nature, and particularly in that of Mr. Wolf. I confine myſelf here to exhibit in a few words the principles we have occaſion for, in order to explain the rights of nations.

§ 120. Of the right of procuring proviſions by force.

The earth was deſigned to feed its inhabitants, and the property of one ought not to reduce him who is in the want of every thing, to die with hunger. When therefore a nation is in abſolute want of proviſions, it may oblige its neighbours who have more than they want for themſelves, to deliver them up at a juſt price, or even to take them by force, if they will not ſell them. Extreme neceſſity revives the primitive communion, the abolition of which ought to deprive no perſon of the neceſſaries of life (§ 117.). The ſame right belongs to individuals when a foreign nation refuſes them a juſt aſſiſtance. Captain Bontekoe, a Dutchman, having loſt his veſſel at ſea, ſaved himſelf in the ſhallop with a part of the crew, and landed on an Indian coaſt, where the barbarous inhabitants refuſing him proviſions, the Dutch obtained them ſword in hand [f].

§ 121. Of the right of making uſe of the things that belong to others.

In the ſame manner, if a nation has a preſſing want of the veſſels, waggons, horſes, or even the labour of ſtrangers, it makes uſe of them either by free conſent or by force; provided that the proprietors are not under the ſame neceſſity. But as it has no more right to theſe things

[f] Bontekoe's voyage, in the voyages of the Dutch to the Eaſt Indies.

than

than neceſſity gives it, it ought to pay for the uſe it makes of them, if it be able to do it. The practice of Europe is agreeable to this maxim. Nations retain by force foreign veſſels found in a port, but they pay for the advantage they reap from them.

§ 122. Of the right of carrying off women.

Let us ſay a word on a more ſingular caſe, ſince authors have treated of it; a caſe in which at preſent people are never reduced to employ force. A nation can only preſerve and perpetuate itſelf by propagation. A people have then a right to procure the women abſolutely neceſſary to its preſervation, and if its neighbours, who have more than they make uſe of for that purpoſe, refuſe them, they may juſtly have recourſe to force. We have a famous example of this in the rape of the Sabines [g]. But though a nation is allowed to procure for itſelf, even by force of arms, the liberty of obtaining young women in marriage, no particular young woman, can be conſtrained in her choice, nor become, by right, the wife of her raviſher. Attention has not been paid to this by thoſe who have decided without reſtriction, that the Romans did nothing unjuſt on this occaſion [h]. It is true, that the Sabine women ſubmitted to their fate with a good grace, and when their nation took up arms to revenge them, it ſufficiently appeared from the zeal with which they themſelves ruſhed between the combatants, that they freely acknowledged the Romans for their lawful huſbands.

Let us ſay ſtill, that if the Romans, as many pretend, were originally no more than a band of robbers united under Romulus; they did not form a true nation, or a juſt ſtate; the neighbouring nations were then much in the right to refuſe them women, and the law of nature, which approves no civil ſociety, but thoſe that are juſt, did not require them to furniſh that ſociety of vagabonds and robbers with the means of perpetuating themſelves: much leſs did it authoriſe them to procure theſe means by

[g] *Tit. Liv. Lib. I.* [h] *Wolfii Juſ. Gent.* § 341.

force.

force. In the same manner, no nation was obliged to furnish the Amazons with males. That female state, if it ever existed, put itself by its own fault out of a condition to support itself without foreign assistance.

§ 123. Of the right of passage.

The right of passage is also a remainder of the primitive communion in which the entire earth was common to men, and the passage was every where free according to their necessities; nobody could entirely deprive them of this right (§ 117.); but the exercise of it was limited by the introduction of domain and property: since that introduction we can no otherwise make use of it than by respecting the proper rights of others. The effect of property is to make the advantage of the proprietor prevail over that of all others. When therefore the master of the territory thinks proper to refuse your entering into it, it is necessary that you should have some reason stronger than his, for entering it in spite of him. Such is the right of necessity: it permits your performing an action illicit on other occasions, that of not respecting the right of domain. When a true necessity obliges you to enter into the country of another; for example, if you cannot otherwise deliver yourself from an imminent danger, if you have no other passage for procuring the means of life, or those of satisfying some other indispensable obligation, you may force a passage that is unjustly refused. But if an equal necessity obliges the proprietor to refuse your entrance, he refuses it justly; and his right prevails over yours. Thus a vessel tost by a tempest, has a right to enter, even by force into a foreign port. But if that vessel is infected with the plague, the master of the port may keep it at a distance, by discharging his cannon, and yet not offend either against justice or even charity, which in such a case ought doubtless to begin at home.

§ 124. And of procuring what we want.

The right of passage in a country would be often useless without that of procuring, at a just price, the things the person has occasion for; as we have already shewn (§ 120.)

(§ 120.) that we may, in case of necessity, take provisions even by force.

§ 125. Of the right of inhabiting a foreign country.

In speaking of exile and banishment, we have observed (Book I. § 229—231.) that every man has a right to inhabit some part of the earth. What we have shewn with respect to individuals, may be applied to whole nations: for if a people are driven from the place of their abode, they have a right to seek a retreat: the nation to which they address themselves ought then to grant them a place of habitation, at least for a time, if it has not very important reasons to refuse them. But if the country inhabited by this nation is scarcely sufficient for itself, nothing can oblige it to admit strangers to settle there for ever: and even when it is not convenient to grant them a perpetual habitation, it may send them away. As they have the resource of seeking an establishment elsewhere, they cannot be authorised by the right of necessity to stay in spite of the master of the country. But it is necessary, in short, that these fugitives should find a retreat, and if every body refuses them, they may justly fix in the first country where they find land enough for themselves, without taking that cultivated by the inhabitants: but in this case, their necessity gives them only the right of habitation, and they ought to submit to all the tolerable conditions imposed upon them by the master of the country; as paying him tribute, becoming his subjects, or at least of living under his protection, and in certain respects depending on him. This right, as well as the two preceding, is a remainder of the primitive communion.

§ 126. Of things the use of which is inexhaustible.

We have sometimes been obliged to anticipate the subject of the present chapter in order to follow the order of the different subjects that present themselves. Thus, in speaking of the open sea, we have remarked (Book I. § 281.) that things the use of which is inexhaustible cannot fall under the domain or property of any one: because in that free and independent state in which nature has produced them, they may be equally useful to all men.

Even

Even the things which in other reſpects are ſubject to domain, if their uſe is inexhauſtible they remain common with reſpect to that uſe. Thus a river may be ſubject both to domain and empire; but in quality of running water it remains common; that is, the maſter of the river cannot hinder any one from drinking and drawing water out of it. Thus the ſea, even in thoſe parts that are occupied, being ſufficient for the navigation of the whole world, he who has the domain cannot refuſe a paſſage through it to any veſſel from which he has nothing to fear. But it may happen, by accident, that this inexhauſtible uſe of the thing may be juſtly refuſed by the maſter, when advantage cannot be made of it, without incommoding him, or doing him a prejudice. For inſtance, if you cannot come to my river for water without paſſing over my land, and damaging the crop it bears, I may exclude you for that reaſon, from the inexhauſtible uſe of the running water; and you loſe it by accident. This leads us to ſpeak of another right that has a great connection with this, and is even derived from it; that is the right of *innocent uſe*.

§ 127. Of the right of innocent uſe.

We call *innocent uſe* or *innocent utility* that which may be derived from a thing without cauſing either loſs or inconvenience to the proprietor; and the *right* of *innocent uſe* is the right we have to that uſe which may be drawn from things belonging to another, without cauſing him either loſs or inconvenience. I have ſaid that this right flows from the right to things, the uſe of which is inexhauſtible. In fact, a thing that may be uſeful to any one without loſs or inconvenience to the maſter, is, in this reſpect, an inexhauſtible uſe, and for this reaſon the law of nature allows all men a right to it notwithſtanding the introduction of domain and property. Nature, who deſigns her gifts for the common advantage of men, does not allow of their being kept from their uſe, when they can be furniſhed with them without any prejudice to the proprietor, and by leaving ſtill untouch-

ed

ed all the utility and advantages he is capable of receiving from his rights.

§ 128. Of the nature of this general right.

This right of innocent uſe is not a perfect right like that of neceſſity; for it belongs to the maſter to judge, if the uſe we would make of a thing that belongs to him, will be attended with no damage and inconvenience. If others pretend to judge of it, and to force the proprietor, in caſe of refuſal, he would be no longer maſter of his property. Frequently the uſe of a thing will appear innocent to him that would receive advantage from it, though in fact it is not ſo; and therefore to undertake to force the proprietor, is obliging him to commit injuſtice, or rather it is actually to commit it, ſince it is violating a right that belongs to him, of judging what he ought to do. In all caſes ſuſceptible of doubt we have then only an imperfect right to the innocent uſe of the things that belong to others.

§ 129. And in caſes not doubtful.

But when the innocence of the uſe is evident, and abſolutely indubitable, the refuſal is an injury. For beſides it's manifeſtly depriving him who demands the innocent uſe of his right, it ſhews with reſpect to him, the injurious diſpoſitions of hatred and contempt. To refuſe a merchant-ſhip the paſſage into a ſtrait, to fiſhermen the liberty of drying their nets on the banks of the ſea, or to deny others the privilege of water out of a river, is viſibly injuring their right to an innocent uſe. But in all caſes, if we are not preſſed by neceſſity, we may demand of the maſter the reaſons of his refuſal, and if he gives none, we may conſider him as unjuſt, or as an enemy with whom we are to act according to the rules of prudence. In general we ſhould regulate our ſentiments and conduct towards him, according to the greater or leſs weight of the reaſons on which he acts.

All

§ 130. Of the exerciſe of this right between nations.

All nations have then a general right to the innocent uſe of the things that are under any one's domain. But in the particular application of this right, it is for the proprietary nation to ſee whether the uſe that would be made of what belongs to it is truly innocent, and if it refuſes, it ought to allege its reaſons; for it ought not to deprive others of their right through mere caprice. All this proceeds from right; and it muſt be remembered that the innocent uſe of things is not comprehended in the domain or the excluſive property. The domain gives only the right of judging in particular caſes, whether the uſe is really innocent. Now he who judges ought to have his reaſons, and he ſhould mention them if he would appear to judge, and not to act from caprice or ill-nature. All this, I ſay, is of right; we are going to conſider in the following chapter, what the duties of a nation with reſpect to what others preſcribe in the uſe to be made of its rights.

CHAP. X.

How a Nation ought to uſe its Right of Domain in order to diſcharge its Duties towards others, with reſpect to their innocent Uſe.

§ 131. The general duty of the proprietor.

SINCE the law of nations treats, as well of the duties of ſtates as of their rights, it is not ſufficient to explain on the ſubject of innocent uſe, what all nations have a right to require from the proprietor; we ought now to conſider the influence of the duties towards others in the conduct of the ſame proprietor. As it belongs to him, to judge whether the uſe is really innocent, and whether it will be attended with no damage to himſelf, he ſhould found his refuſal on true and ſolid reaſons. This is a maxim of equity: he ought not even to take this meaſure for trifles, for a ſlight loſs, or ſome little inconvenience; humanity forbids this, and the mutual love which men owe to each other, requires greater

ſacrifices,

ſacrifices. It would be certainly deviating too far from that univerſal benevolence which ought to unite the human race, to refuſe a conſiderable advantage to a ſingle perſon, or to a whole nation, when there would reſult from granting it an inconſiderable loſs, or a ſmall inconvenience to ourſelves. A nation ought then, in this reſpect to regulate itſelf on all occaſions, from reaſons proportioned to the advantages and neceſſities of others, and to reckon as nothing a ſmall expence or ſupportable inconvenience, when great good will reſult from it to any other. But nothing obliges it to be at expence, or to throw itſelf into embarraſſments to grant others a cuſtom that will be neither neceſſary to them nor very uſeful. The ſacrifice we here require is not contrary to the intereſt of the nation. It is natural to think that the others will behave in the ſame manner in return; and what advantages will reſult from this, with reſpect to all ſtates.

§ 132. Of innocent paſſage.

Property cannot deprive nations of the general right of travelling over the earth in order to have a communication with each other, for carrying on trade, and other juſt reaſons. The maſter of a country may only refuſe the paſſage on particular occaſions, where he finds it prejudicial or dangerous. He ought then to grant it for lawful caſes, whenever he can do it without inconvenience to himſelf. And he cannot lawfully affix burdenſome conditions to a conceſſion which he is obliged to perform, and which he cannot refuſe who would diſcharge his duty, and not abuſe his right of property. The Count of Lupfen having improperly ſtopped ſome merchandiſe in Alſace, complaints were carried to the emperor Sigiſmund who was then at the council of Conſtance, upon which that prince aſſembled the electors, princes, and deputies of towns, to examine the affair. The opinion of the Bourgrave of Nurembourg deſerves to be mentioned: "God, ſaid he, has created heaven for himſelf and his "ſaints, and has given the earth to man, in order to "make it of uſe to the poor and the rich. The roads

"are

"are for their uſe, and God has not ſubjected them to "any taxes." He condemned the Count of Lupſen to reſtore the merchandiſe, and to pay coſts and damage, becauſe he could not juſtify his ſeizure by any particular law. The emperor approved this opinion, and paſſed ſentence accordingly [i].

§ 133. Sureties may be required.

But if the paſſage raiſes the apprehenſion of ſome danger, the ſtate has a right to require ſureties; he who would paſs cannot refuſe them, a paſſage being due to him, only ſo far as it is attended with no inconvenience.

§ 134. Of the paſſage of merchandiſe.

A paſſage ought alſo to be granted for merchandiſe, and as this may, in common, be done without inconvenience, to refuſe it without juſt reaſon, is injuring a nation; and endeavouring to deprive it of the means of carrying on a trade with other ſtates. If this paſſage occaſions any inconvenience, any expence for the preſervation of canals and highways, it may be recompenſed by the rights of toll (Book I. § 103.).

§ 135. Of abode in the country.

In explaining the effects of domain we have ſaid above (§ 94. and 100.) that the maſter of the territory may forbid the entrance into it, or permit it on ſuch conditions as he thinks proper: this external right then ought to be reſpected by ſtrangers. But now we conſider it under another view, relatively to the duties of the maſter, and to his internal rights; we ſay that he cannot without particular and important reaſons, refuſe either the paſſage or an abode to ſtrangers who deſire it from juſt cauſes. For the paſſage, or the abode, being in this caſe an innocent advantage, the law of nature does not give him a right to refuſe it, and though other nations, and all men in general, are obliged to ſubmit to his judgment (§ 128. and 130.), he does not the leſs offend againſt his duty, if he refuſes improperly: he then acts without any true right; nay he abuſes his external right. He cannot, without ſome particular and preſſing reaſon, refuſe the

[i] Stettler, Vol. I. p. 114. Tſchudi, Vol. II. p. 27, 28.

reſidence

residence of a stranger who comes with the hopes of recovering his health in the country, or to acquire instructions in the schools and academies. A difference in religion is not a sufficient reason to exclude him, provided he abstains from disputation; this difference not depriving him of the rights of humanity.

§ 136. How people ought to act with respect to strangers who desire a perpetual residence.

We have seen (§ 125.) how the right of necessity may authorise, in certain cases, a people driven from the place of their residence, to settle in the territory of another nation. Every state ought, doubtless, to grant to so unhappy a people, that succour and assistance which it can bestow without being wanting to itself: but granting them an establishment in the land belonging to the nation, is a very delicate step, the consequences of which should be maturely considered, by a conductor of the state. The emperors Probus and Valens found that they had done ill in having received into the territories of the empire numerous bands of Gepides, Vandals, Goths, and other barbarians [k]. If the sovereign finds that it would be too inconvenient and dangerous, he has a right to refuse an establishment to these fugitive people, or on receiving them, to take all the precautions that prudence can dictate to him. One of the safest will be, not to permit these strangers to dwell together in the same country, and to keep up there the form of a separate nation. Men who have not been able to defend their own country, cannot pretend to any right to establish themselves in the territory of another, in order to maintain themselves there as a nation in a body [l]. The sovereign who receives them may therefore disperse them, and distribute them into the towns and provinces want-

[k] *Vopiscus, Prob. C.* XVIII. *Ammian. Marcell. Lib.* XXXI. *Socrat. Hist. Eccles. Lib.* IV. *C.* 28.

[l] Cæsar replied to the Tenctherians and Usipetes, who were resolved to keep the land they had seized, that it was not just for them to invade the possessions of others, after their not being able to defend their own. *Neque verum esse, qui suos fines tueri non potuerint alienos occupare.* De bello Gallico, Lib. IV. Cap. VIII.

ing

ing inhabitants. In this manner his charity will turn to his own advantage, to the increaſe of his power, and to the greateſt benefit of the ſtate. What a difference is there in Brandenbourg ſince the ſettlement of the French refugees! The great elector Frederic William, offered an aſylum to theſe unfortunate people; he provided for their expences on the road, eſtabliſhed them in his ſtates at an expence that was truly royal: and this beneficent and generous prince merited the title of a wiſe and able politician.

§ 137. Of the right proceeding from a general permiſſion.

When by the laws, or cuſtom of a ſtate, certain actions are generally permitted to ſtrangers, as for inſtance, travelling freely and without an expreſs permiſſion in the country, marrying there, buying or ſelling merchandiſe, hunting, fiſhing, &c. one nation cannot be excluded from enjoying the general permiſſion, without doing it an injury, unleſs there is ſome particular lawful reaſon for refuſing to that nation what is granted indiſcriminately to others. We ſhould remember that the inquiry here is about actions of innocent uſe: and as the nation permits them to ſtrangers without diſtinction, it makes known with ſufficient plainneſs, that it thinks them innocent in relation to itſelf; and this is to declare, that ſtrangers have a right to them (§ 127.): the innocence is manifeſt by the confeſſion of the ſtate, and the refuſal of an advantage that is manifeſtly innocent, is an injury (§ 129.). Beſides, to forbid without any cauſe to one people, what is indifferently permitted to all, is an injurious diſtinction, ſince it can only proceed from hatred or contempt. If there is any particular well-founded reaſon for an exception, the thing is no longer an innocent uſe with reſpect to that people, and no injury is done to them. The ſtate may alſo, by way of puniſhment, except from the general permiſſion a people who have given it juſt cauſe of complaint.

§ 138. Of a right granted in form of a benefit.

As to rights of this nature granted to one or many nations for particular reaſons, they are given to them in the form

form of benefits, by a convention, or out of gratitude, for ſome particular ſervice; thoſe to whom the ſame rights are refuſed, cannot conſider themſelves as offended. The nation cannot judge that ſuch actions are an innocent uſe, ſince it does not permit them to every one indifferently; and it may, at pleaſure, cede rights that belong to itſelf, without any perſon having cauſe of complaint, or of pretending to the ſame favour.

§ 139. The nation ought to be courteous.

Humanity is not confined to permitting foreign nations an innocent advantage which they may derive from what belongs to us; but it alſo requires that we ſhould facilitate even the means of their improving it, ſo far as this can be done without injury to ourſelves. Thus in a well-regulated ſtate, there are every where inns in which travellers may be aſſigned lodgings at a reaſonable price, where the people will watch over their ſafety, and where they are treated with equity and humanity. A polite nation ſhould give the kindeſt reception to ſtrangers, receive them with politeneſs, and on every occaſion, ſhew a diſpoſition to ſerve them. By theſe means every citizen will diſcharge his duty with reſpect to all mankind, and will be of real ſervice to his country. Glory is the certain reward of virtue, and the good-will attracted by an amiable character, has often very important conſequences, with reſpect to the ſtate. No nation is in this reſpect more worthy of praiſe than the French: foreigners no where receive a more agreeable reception, and one more proper to hinder their regretting the immenſe ſums they annually ſpend in Paris.

CHAP.

CHAP. XI.

Of Uſucaption and Preſcription among Nations.

LET us conclude what relates to domain and property with an examination of a celebrated queſtion on which the learned are much divided. It is aſked if *uſucaption* and *preſcription* may take place between independent nations and ſtates?

§ 140. The definition of uſucaption and preſcription.

Uſucaption is the acquiſition of domain founded on a long poſſeſſion uninterrupted and undiſputed; that is, on an acquiſition ſolely proved by this poſſeſſion. Wolf defines it, an acquiſition of domain founded on a preſumed deſertion. His definition explains the manner in which a long and peaceable poſſeſſion may ſerve to eſtabliſh the acquiſition of domain. Modeſtinus, *Digeſt. Lib.* 3. *de Uſurp. & Uſucap.* ſays, in conformity to the principles of the Roman law, that *uſucaption* is the acquiſition of domain from a continued poſſeſſion during a time expreſſed by the law. Theſe three definitions have nothing in them incompatible with each other, and it is eaſy to reconcile them by making an abſtract of what relates to the civil law in the laſt. In the firſt of theſe definitions we have endeavoured clearly to expreſs the idea commonly affixed to the term *uſucaption*.

Preſcription is the excluſion of all pretenſions to a right founded on the length of time during which it has been neglected; or, as Wolf defines it, the loſs of a proper right in virtue of a preſumed conſent. This definition is juſt; that is, it explains how a long neglect of a right occaſions its being loſt, and it agrees with the nominal definition we give to *preſcription*, and in which we explain what is commonly underſtood by this term. As to the reſt, the term *uſucaption* is but little uſed, and therefore we ſhall make uſe of that of *preſcription*, whenever there is not an abſolute neceſſity to employ the other.

Now

§ 141. That usucaption and prescription are derived from the law of nature.

Now to decide the question we have proposed, we must first see whether usucaption and prescription are derived from the law of nature, many illustrious authors have said and proved it[b]. Though in this treatise we frequently suppose the reader acquainted with the law of nature, it is proper to establish the decision since the affair is disputed.

Nature has not herself established property with respect to wealth, and in particular with regard to lands; she only approves this introduction, for the advantage of the human race. It would be absurd then to say that domain and property being once established, the law of nature can secure to a proprietor any right capable of introducing disorder into human society. Such would be the right of entirely neglecting the thing that belongs to him, of leaving it during a long space of time, under all the appearances of being properly abandoned, or that does not belong to him, and of coming at length to deprive an honest possessor of it, who has perhaps acquired a title by burdensome conditions, received it as an inheritance from his father, or as a portion with his wife, and who might have made other acquisitions, had he been able to know that this was neither solid nor lawful. Far from giving such a right, the law of nature prescribes to the proprietor the care of what belongs to him, and lays him under an obligation to make known his right, that others may not be led into an error: for nature does not approve his property, and only secures it to him on these conditions. If he neglects this for a long time enough not to be admitted to reclaim it, without endangering the rights of others, the law of nature will not permit him to reclaim it. We ought not then to consider property as so extensive and secure a right that it can be absolutely neglected during a long space of time, notwithstanding all the inconve-

[b] See *Grotius de Jure Belli & Pacis, Lib.* II. *Cap.* IV. *Pufendorf Jus Nat. & Gent. Lib.* IV. *Cap.* XII. and especially *Wolfius Jus Nat.*

niences that may happen to human ſociety by the proprietor reſolving to make uſe of it, according to his caprice. Why does the law of nature order all to reſpect this right of property in him who poſſeſſes it, if it is not for the peace, ſafety, and advantage of human ſociety? Nature muſt then, from the ſame reaſon, require that every proprietor who for a long time, and without any juſt reaſon, neglects his right, ſhould be preſumed to have entirely renounced and abandoned it. This is what forms the abſolute preſumption, or *juris & de jure* of its being abandoned, and upon which another is legally intitled to appropriate the thing abandoned to himſelf. The abſolute preſumption does not here ſignify a conjecture about the ſecret will of the proprietor; but a maxim which the law of nature ordains ſhould be conſidered as true and ſtable, and this with a view of maintaining peace and order among men. It compoſes therefore a title as firm and juſt, as that of property itſelf, eſtabliſhed and ſupported by the ſame reaſons. The honeſt poſſeſſor who had founded a preſumption of this kind, has then a right approved by the law of nature; and this law, which requires that the right of every one ſhould be firm and certain, does not permit their being diſturbed in their poſſeſſions.

The right of *uſucaption* proper ſignifies, that the honeſt poſſeſſor is not obliged to ſuffer his property to be diſputed; he proves this by his poſſeſſion itſelf, and he repulſes the demand of the pretended proprietor, by preſcription. Nothing can be more equitable than this rule. If the plaintiff was permitted to prove his property, he might happen to bring proof, that to appearance was extremely evident; but would only be ſo, from the loſs of ſome writing, or ſome witneſs, who might have ſhewn how he had loſt or conferred his right. Would it be reaſonable for him to call in queſtion the rights of the poſſeſſor, when by his fault he has ſuffered things to run into ſuch a ſituation, that the truth is in danger of not being

ing discovered? If it be necessary that one of the two should be exposed to lose his property, it is just it should be him who is in fault.

It is true, that if the honest possessor should discover with entire certainty, that the plaintiff is the true proprietor, and that he never abandoned his right, he ought in conscience, and from an internal law, to restore all he has received belonging to the plaintiff. But this estimation is not easily made, and it depends on circumstances.

§ 142. What is required to found the ordinary prescription.

Prescription being only founded on an absolute or lawful presumption, it has no place, if the proprietor has not really neglected his rights. This condition implies three particulars: 1. That the proprietor cannot alledge an invincible ignorance, either on his own part, or on that of his friends. 2. That he cannot justify his silence by lawful and solid reasons. 3. That he has neglected his right, or kept silence during a considerable number of years; for the negligence of a few years, being incapable of producing confusion, and of rendering the respective right of the party doubtful, is not sufficient to found or authorise a presumption of his having abandoned it. It is impossible to determine by the law of nature the number of years required to found a prescription: this depends on the nature of the property disputed, and the circumstances of the case.

§ 143. Of prescription immemorial.

What we have remarked in the preceding section, relates to ordinary prescription. There is another called *immemorial*, because it is founded on immemorial possession: that is, on a possession, the origin of which is unknown, or so obscure, that it cannot be proved whether the possessor had a real proprietary right, or whether he received the possession from another. This prescription *immemorial* secures the possessor's right, and it cannot be taken from him; for it is presumed that he has the right of a proprietor, while no solid reasons have been brought against him; and, indeed, from whence could these reasons be derived, when the origin of his possession is lost in

the obſcurity of time? It ought even to ſecure him from every pretenſion contrary to his right. What would be the caſe were it permitted to call in queſtion a right acknowledged time immemorial, when the means of proving it were deſtroyed by time? Immemorial poſſeſſion is then a title not to be expunged, and immemorial preſcription ſuffers no exception: both are founded on a preſumption which the law of nature preſcribes us to take for an inconteſtable truth.

§ 144. Of him who alledges reaſons for his ſilence.

In caſe of ordinary preſcription, this cannot be oppoſed to him who alledges juſt reaſons for his ſilence, as the impoſſibility of ſpeaking, or a well-founded fear, &c. becauſe there is then no longer any room for a preſumption that he has abandoned his right. It is not his fault if people have thought they had a right to preſume it, and he ought not to ſuffer by it; he cannot be refuſed the liberty of proving clearly his property. This method of defence againſt preſcription, has been often employed againſt the princes whoſe formidable forces have long reduced to ſilence the weak, the victims of their uſurpations.

§ 145. Of him who ſufficiently ſhews, that he would not abandon his right.

It is alſo very evident, that we cannot oppoſe preſcription to the proprietor who not being able actually to proſecute his right, confines himſelf to ſhewing ſufficiently by any ſign whatſoever that he would not abandon it. This anſwers the purpoſe of proteſtations. Among ſovereigns they preſerve the title and arms of a ſovereignty, or of a province, to ſhew that they do not abandon their rights.

§ 146. Preſcription founded on the actions of the proprietor.

Every proprietor who does, or who expreſsly omits things which he cannot do, or omit, without renouncing his right; ſufficiently indicates, by that means, that he would not preſerve it, at leaſt, if he does not make an expreſs reſervation. People have doubtleſs a right to conſider as true what he ſufficiently evinces on occaſions where he ought to declare the truth; conſequently, they lawfully preſume, that he has abandoned his right, and if he would

would afterwards resume it, they may oppose to him prescription.

§ 147. Usucaption and prescription take place between nations.

After having shewn that *usucaption* and *prescription* are founded in the law of nature, it is easy to prove, that they are equally a part of the law of nations, and ought to take place between different states. For the law of nations is nothing but the application of the law of nature to nations, rendered, in a manner, suitable to the subject (Prelim. § 6.). And so far is the nature of the subject from forming here any exception, that usucaption and prescription, are much more necessarily used between sovereign states, than between individuals. Their quarrels are attended with very different consequences, their disputes are usually terminated only by bloody wars; and consequently the peace and happiness of mankind much more powerfully require that the possessions of sovereigns should not be easily disturbed, and that if they have not been disputed for a great number of years they be reputed just and not to be disputed. Were it permitted to have constantly recourse to ancient times, there are few sovereigns who would enjoy their rights in security, and there would be no peace to be hoped for on earth.

§ 148. It is more difficult to found them among nations on a presumptive desertion.

It must however be confessed, that usucaption and prescription are often more difficult in their application to nations, as these rights are founded on a presumption drawn from a long silence. Nobody is ignorant how dangerous it commonly is for a weak state to discover only the shadow of any pretension to the possession of a powerful monarch. It is therefore difficult to found a lawful presumption of its having abandoned a right from a long silence. Add to this, that the conductor of the society having commonly no power to alienate what belongs to the state, his silence can be of no prejudice to the nation or to his successors, though it should even be presumed that it was abandoned by him. The question then would be, whether the nation has neglected to supply the silence of

of its conductor, or whether it had ſhared in it by a tacit approbation.

§ 149. Other principles that enforce preſcription.

But there are other principles that eſtabliſh the uſe and force of preſcription between nations. The tranquillity of the people, the ſafety of ſtates, the happineſs of the human race, do not allow that the poſſeſſions, empire, and other rights of nations ſhould remain uncertain, ſubject to diſpute, and always ready to occaſion bloody wars. It is neceſſary then to admit between nations a preſcription founded on a long ſpace of time, as a ſolid and inconteſtable method. If any one has kept ſilence through fear, by a kind of neceſſity, the loſs of his right is a misfortune which he ought to ſuffer patiently, ſince he cannot avoid it; and why ſhould he not ſupport it as well as having his towns and provinces taken from him by an unjuſt conqueror, and being afterwards forced to cede them to him by treaty? Theſe reaſons eſtabliſh the uſe of preſcription, only in the caſe of a very long poſſeſſion undiſputed and uninterrupted; becauſe, it is neceſſary that affairs ſhould be at length terminated and eſtabliſhed on a firm and ſolid foundation. All this can be of no weight, when the poſſeſſion has laſted only a few years, during which prudence may require a perſon to keep ſilence without there being any room to accuſe him of ſuffering things to become uncertain, and of renewing quarrels without end.

As to immemorial preſcription, what we have ſaid (§ 143.) is ſufficient to convince every one, that it ought neceſſarily to take place between nations.

§ 150. Of the voluntary law of nations on this ſubject.

Uſucaption and preſcription being ſo neceſſary to the tranquillity and happineſs of human ſociety, it is juſtly preſumed that all nations have conſented to admit the uſe of them as lawful and reaſonable with a view to the common advantage, and even to the particular benefit of each nation.

Preſcription of many years ſtanding, as well as uſucaption, is then eſtabliſhed by the voluntary law of nations (Prelim. § 21.).

As in virtue of the ſame right, nations in all doubtful caſes, are ſuppoſed to act with reſpect to each other, with an equal right (Ibid.); ſo the preſcription ought much more to have its effect between nations, as ſoon as it is founded on a long indiſputed poſſeſſion, without its being allowable, at leaſt if no clear evidence be brought, to prove that the poſſeſſion is unjuſt. For without ſuch evidence every nation is conſidered as being poſſeſſed of good faith. Such is the right that a ſovereign ſtate ought to grant to others; but it ought only to allow itſelf the uſe of the internal and neceſſary right (Prelim. § 28.). Preſcription is only lawful at the bar of conſcience with reſpect to an honeſt poſſeſſor.

§ 151. Of the right of treaties or of cuſtom in this matter.

Since preſcription is ſubject to ſo many difficulties, it would be of great advantage for neighbouring nations to ſubmit to a rule in this reſpect by treaties, principally with regard to the number of years required to found a lawful preſcription, ſince this laſt cannot be in general determined by the law of nature alone. If in default of treaties, cuſtom has determined any thing in this matter, the nations between whom this cuſtom is in force, ought to conform to it (Prelim. § 26.).

CHAP.

CHAP. XII.

Of Treaties of Alliance and other public Treaties.

§ 152. The nature of treaties.

THE ſubject of treaties is, doubtleſs, one of the moſt important that the mutual relation and affairs of nations can preſent us with. Too much convinced of the little foundation that can be placed on the natural obligations of bodies politic, and on the reciprocal duties impoſed upon them by humanity; the moſt prudent endeavour to procure by treaties the ſuccours and advantages which the law of nature would ſecure to them, if the pernicious counſels of a falſe policy did not render it ineffectual.

A treaty, in Latin *Fœdus*, is a pact made with a view to the public welfare by the ſuperior power, either for perpetuity or for a conſiderable time.

§ 153. Of pactions, agreements, or conventions.

The pacts with a view to tranſitory affairs are called agreements, conventions, and pactions. They are accompliſhed by one ſingle act, and not by iterated oaths. Theſe pacts are perfected in their execution once for all: treaties receive a ſucceſſive execution, the duration of which equals that of the treaty.

§ 154. By whom treaties are made.

Public treaties can only be executed by ſuperior powers, by ſovereigns who contract in the name of the ſtate Thus the conventions made by ſovereigns between each other for their own private affairs, and thoſe between a ſovereign and a private perſon, are not public treaties.

The ſovereign who poſſeſſes the full and abſolute authority has, doubtleſs, a right to treat in the name of the ſtate he repreſents, his engagements are binding with reſpect to the whole nation. But all the conductors of ſtates, have not the power of making of themſelves public treaties: ſome are obliged to take the advice of a ſenate, or of the repreſentatives of the nation. In the fundamental laws of each ſtate, we muſt ſee what is the

power

iterated

power capable of contracting with validity in the name of the ſtate.

What we ſay here of public treaties, being only to be made by the ſuperior power, does not hinder that treaties of this nature may not be made by princes or communities who have a right to do it, either by the conceſſion of the ſovereign, or by the fundamental laws of the ſtate, by reſervation or by cuſtom. Thus the princes and free cities of Germany, have the right of forming alliances with foreign powers, though they hold of the emperor and the empire. The conſtitutions of the empire give them in this reſpect, as in many others, the rights of ſovereignty. Some cities of Switzerland, though ſubject to a prince, have made alliances with the cantons: the permiſſion, or toleration of the ſovereign, has given birth to theſe treaties, and a long uſe has eſtabliſhed a right.

§ 155. If a ſtate under protection may conclude treaties.

A ſtate that has put itſelf under the protection of another, not loſing on that account its quality of ſovereignty (Book I. § 192.); makes treaties and contracts alliances, at leaſt, if it has not expreſsly renounced that right, in the treaty of protection. But this treaty of protection is binding ever after, ſo that the ſtate can enter into no engagements contrary to it, that violate the expreſs conditions of the protection, or that are repugnant in their own nature to every treaty of protection. Thus the protected cannot promiſe aſſiſtance to the enemies of the protector, nor grant them a paſſage.

§ 156. Treaties concluded by proxies or plenipotentiaries.

Sovereigns treat with each other by their proxies who are inveſted with ſufficient power, and who are commonly called plenipotentiaries. We here apply all the rules of the law of nature to things that are done by commiſſion. The rights of the proxy are expreſſed in the inſtructions that are given him: he ought not to deviate from them; but every thing he promiſes within the terms of his commiſſion, and the extent of his powers, bind his conſtituent.

At preſent, in order to avoid all danger and difficulty, princes reſerve to themſelves the ratification of what has been concluded upon in their name by their miniſters. The full power is nothing but a procuration *cum libera*. If this procuration was to have its full effect, they could not be too circumſpect in giving it. But as princes cannot be conſtrained to fulfil their engagements, any otherwiſe than by force of arms, they are accuſtomed not to lay any ſtreſs on their treaties, till they have agreed upon and ratified them. Every thing that their miniſters have concluded remaining without force, till the prince's ratification, there is leſs danger in giving him a full power. But to refuſe with honour to ratify what has been concluded on by virtue of a full power, it is neceſſary that the ſovereign ſhould have ſtrong and ſolid reaſons, and that he ſhould ſhew in particular that his miniſter has deviated from his inſtructions.

§ 157. Of the validity of treaties.

A treaty is valid if there be no fault in the manner in which it was concluded: and for this purpoſe nothing more can be required, than a ſufficient power in the contracting parties, and their mutual conſent, ſufficiently declared.

§ 158. Injury does not render them void.

An injury cannot then render a treaty invalid. He who enters into engagements ought carefully to weigh every thing before he concludes; he may do what he pleaſes with his own property, relax his rights, and renounce his advantages, as he thinks proper; the acceptor is not obliged to inform himſelf of his motives, and to weigh their juſt value. If we might break a treaty, becauſe we found ourſelves injured by it, there would be no ſtability in the contracts of nations. Civil laws may ſet bounds to injury, and determine the point capable of producing the utility of a contract. But ſovereigns acknowledge no judge. How ſhall they obtain a certainty of the injury? Who ſhall determine the degree ſufficient to invalidate a treaty! The peace and happineſs of nations

tions manifeſtly require that their treaties do not depend on a nullity ſo vague and dangerous.

§ 159. The duty of nations in this reſpect.

But a ſovereign is not leſs obliged in point of conſcience to pay a regard to equity, and to obſerve it as much as poſſible, in all his treaties. And if it happens that a treaty he has honeſtly concluded, without his perceiving any iniquity in it, turns at length to the detriment of an ally, nothing can be more amiable, more laudable, more conformable to the reciprocal duties of nations, than to yield as much as poſſible, without being wanting to himſelf, without putting himſelf in danger, or without ſuffering a conſiderable loſs.

§ 160. The nullity of treaties pernicious to the ſtate.

Though the ſimple injury, or ſome diſadvantage in a treaty, is not ſufficient to render it invalid: the caſe is not the ſame with thoſe inconveniencies that lead to the ruin of the ſtate. Since every treaty ought to be made with a ſufficient power, a treaty pernicious to the ſtate is null, and not at all obligatory; no conductor of the nation having the power to enter into engagements to do ſuch things as are capable of deſtroying the ſtate, for the ſafety of which the empire is intruſted to him. The nation itſelf being neceſſarily obliged to perform every thing required for its preſervation and ſafety (Book I. §. 16. and following), it cannot enter into engagements contrary to its indiſpenſable obligations. In the year 1506, the ſtates-general of the kingdom of France, aſſembled at Tours, engaged Louis XII. to break the treaty he had concluded with the emperor Maximilian, and the archduke Philip, his ſon; becauſe that treaty was pernicious to the kingdom. They alſo found, that neither the treaty, nor the oath that had accompanied it, could oblige the king to alienate the dominions of the crown [c]. We have treated of this laſt means of nullity (Book I. Chap. XXI.).

§ 161. The nullity of treaties made for an unjuſt or diſhoneſt purpoſe.

From the ſame reaſon, a want of power, a treaty made from an unjuſt and diſhoneſt intention, is abſolutely null,

[c] See the French hiſtorians.

nobody

nobody having a right to engage to do things contrary to the law of nature. Thus an offenſive alliance made to ravage a nation, from whom there has been no injury received, may, or rather ought, to be broken.

§ 162. If it be permitted to enter into an alliance with thoſe who do not profeſs the true religion.

It is aſked, if it be allowable to make an alliance with a nation that does not profeſs the true religion, and whether treaties made with the enemies of the faith are valid? Grotius [d] has treated this ſubject at large, and this diſcuſſion might be neceſſary at a time when the madneſs of party ſtill darkened thoſe principles which it had long cauſed to be forgotten: but we may venture to believe, that it would be ſuperfluous in our age. The law of nature alone regulates the treaties of nations: the difference of religion is a thing abſolutely foreign to them. Different people treat with each other in quality of men, and not under the character of Chriſtians, or of Muſſulmans. Their common ſafety requires that they ſhould treat with each other, and treat with ſecurity. Every religion that ſhould in this caſe claſh with the law of nature, would bear upon it the marks of reprobation; and it could not come from the author of nature, who is always conſtant, always faithful. But if the maxims of a religion tend to eſtabliſh it by violence, and to oppreſs all thoſe who will not receive it, the law of nature forbids the favouring of that religion, or our uniting ourſelves, without neceſſity, to its inhuman followers; and the common ſafety of mankind invites them rather to enter into an alliance againſt madmen, and to repreſs the bigotted fanatics who diſturb the public repoſe, and threaten all nations.

§ 163. The obligation of obſerving treaties.

It is ſhewn by the law of nature, that he who has made a promiſe to any one, has conferred upon him a true right to require the thing promiſed; and that, conſequently, not to keep a perfect promiſe, is to violate the right of another; and is as manifeſt an injuſtice, as that of depriving a perſon of his property. All the tranquillity, the happineſs, and ſecurity of the human race reſts on

[d] *De Jure Belli & Pacis, Lib.* II, *Cap.* XV, § 8. *& ſeq.*

juſtice;

juſtice; on the obligation of paying a regard to the rights of others. The reſpect of others for our rights of domain and property conſtitutes the ſecurity of our actual poſſeſſions; the faith of promiſes is our ſecurity for the things that cannot be delivered or executed upon the ſpot. There would be no more ſecurity, no longer any commerce between mankind, did they not believe themſelves obliged to preſerve their faith, and to keep their word. This obligation is then as neceſſary, as it is natural and indubitable between the nations that live together in a ſtate of nature, and acknowledge no ſuperior upon earth, to maintain order and peace in their ſociety. Nations, and their conductors, ought then, to keep their promiſes and their treaties inviolable. This great truth, though too often neglected in practice, is generally acknowledged by all nations [c]: the reproach of perfidy is eſteemed by ſovereigns a moſt atrocious injury; now he who does not obſerve a treaty, is certainly perfidious, ſince he violates his faith. On the contrary, nothing adds ſo great a glory to a prince, and the nation he governs, as the reputation of an inviolable fidelity to his promiſes. By this, and by their bravery, the Swiſs have rendered themſelves reſpectable throughout Europe, and have merited the honour of being ſought for by the greateſt monarchs, who truſt to them the ſecurity of their perſons. The parliament of England has more than once thanked the king for his fidelity and zeal in ſuccouring the allies of his crown. This national greatneſs of ſoul, is the ſource of an immortal glory, upon it is founded the confidence of nations, and it thus becomes a certain inſtrument of power and ſplendour.

§ 164. The violation of a treaty is an injury.

As the engagements of a treaty impoſe on the one hand a perfect obligation, they produce on the other a perfect right. To violate a treaty, is then to violate the perfect

[c] Mahomet warmly recommended to his diſciples the obſervation of treaties. Ockley's Hiſtory of the Saracens, Vol. I.

right

right of him with whom we have contracted, and this is to do him an injury.

§ 165. Treaties cannot be made contrary to those that subsist.

A sovereign already bound by a treaty, cannot make others contrary to the first. The things about which he has entered into engagements are no longer at his disposal. If it happens that a posterior treaty is found, in some point, to contradict one that is more ancient, the new treaty is null with respect to that point, as disposing of a thing, that is no longer in the power of him who appears to dispose of it: (this relates to treaties made with different powers). If the ancient treaty is secret, it will have the appearance of bad faith to conclude a contrary one, that may be rendered void whenever occasion serves; and it is not even allowed to enter into engagements, which from the occurrences that may happen, may be found opposite to the secret treaty, and by that means void; at least, if we are unable fully to recompense the new ally otherwise, it would be to abuse him to promise him any thing without informing him that such cases might arise, in which we shall not have the liberty of discharging that promise. The ally thus abused may, doubtless, renounce the treaty; but if he chooses rather to adhere to it, the treaty will hold good with respect to all the articles that are not opposite to the more ancient treaty.

§ 166. How treaties may be concluded with several nations with the same view.

Nothing hinders a sovereign from entering into engagements of the same nature with two or more nations, if he is at the same time able to fulfil them with respect to all his allies. For example, a treaty of commerce with one nation does not prevent others being afterwards made with different states, unless a promise is made in the first treaty not to grant the same advantages to any other. We may in the same manner promise to assist two different allies with troops, if we are able to furnish them both, or if there is no appearance that both will have occasion for them at the same time.

§ 167. The most antient ally should be preferred.

If nevertheless the contrary happens, the most ancient ally ought to be preferred; for the engagement was pure

and

and abſolute with reſpect to him, while we were unable to contract a ſecond; but by reſerving the right of the firſt. The reſervation is a right, and it is a tacit reſervation, if it is not expreſsly made.

§ 168. We owe no aſſiſtance in an unjuſt war.

The juſtice of the cauſe is another reaſon of preference, between two allies, and even we ought not to aſſiſt him whoſe courſe is unjuſt, whether he be at war with one of our allies, or with another ſtate. For this would be the ſame, as if we contracted an alliance for an unjuſt purpoſe; which is not permitted (§ 161.). No one can be validly engaged to ſupport injuſtice.

§ 169. General diviſion of treaties. 1. Of thoſe that relate to things already due by the law of nature.

Grotius divides treaties into two general claſſes: *the firſt, thoſe which turn merely on things to which we were already bound by the law of nature*, and the ſecond of thoſe *by which we engage ſomething more* [f]. The firſt ſerves to ſecure a perfect right to things to which we had only an imperfect right, ſo that from thence forward we might require what before we had only a foundation to deſire, as an office of humanity. Such treaties became very neceſſary among the ancient nations who, as we have already obſerved, did not think themſelves bound to perform any thing for the nations that were not in the number of their allies. They are even of uſe among the moſt polite people, in order the better to ſecure the ſuccours that may be expected, to determine the meaſure and degree of theſe ſuccours, and to know on what we have to depend, to regulate what cannot in general be determined by the law of nature, and to prevent the difficulties, and various interpretations of that law. In ſhort, as the power of aſſiſtance in any nation is not inexhauſtible, it is prudent to ſecure ourſelves a proper right to ſuccour, that cannot be granted to all the world.

Of this firſt claſs are all the ſimple treaties of peace and friendſhip, when the engagements contracted in them add nothing to what men owe each other as bre-

[f] *De jure Belli & Pacis, Lib.* II. *Cap.* XV. § 5.

thren,

thren, and as members of the human ſociety; as thoſe that permit commerce, paſſage, &c.

§ 170. Of the colliſion of theſe treaties with the duties we owe to ourſelves.

If the aſſiſtance and offices that are due in virtue of ſuch a treaty, are found, upon ſome occaſions, incompatible with the duties a nation owes to itſelf, or with what the ſovereign owes to his own nation, the caſe is tacitly, and neceſſarily excepted in the treaty. For neither the nation nor the ſovereign can enter into an engagement to abandon their own ſafety, or the ſafety of the ſtate, to contribute to that of their ally. If the ſovereign has occaſion, in order to preſerve his own nation, for the things he has promiſed in the treaty; if, for example, he has engaged to furniſh corn, and in a time of dearth he has ſcarcely ſufficient for the nouriſhment of his ſubjects, he ought without difficulty to prefer his own nation. For he naturally owed aſſiſtance to a foreign ſtate, only ſo far as that aſſiſtance was in his power, and he can only promiſe it by a treaty upon the ſame footing. Now it is not in his power to take away the ſubſiſtence of a nation, in order to give it to another. Neceſſity here forms an exception, and he does not violate the treaty, becauſe he cannot fulfil it.

§ 171. Of treaties that promiſe merely the doing no injury.

The treaties by which we ſimply engage not to do any evil to an ally, to abſtain, with reſpect to him, from all damage, offence, and injury, are not neceſſary, and produce no new right; each having already from nature, a perfect right not to ſuffer either damage, injury, or any true offence. However theſe treaties become very uſeful, and accidentally neceſſary, among thoſe barbarous nations who think they have a right to make any attempts againſt foreigners. They are not uſeleſs with reſpect to nations leſs ſavage, who without ſo far diveſting themſelves of humanity, are however, much leſs affected by a natural obligation, than by one they themſelves have contracted by ſolemn engagements: and would to God that this manner of thinking was intirely confined to barbarians! We ſee too frequent effects of

of it among thoſe who boaſt of a perfection much ſuperior to the law of nature. But the name of perfidious is prejudicial to the conductors of nations; and it becomes, by this means, formidable to thoſe themſelves who are but little curious about meriting that of virtuous men, and who know how to get rid of the reproaches of conſcience.

Treaties in which ſovereigns engage to do what they are not obliged to perform by the law of nature, are either *equal* or *unequal*.

§ 172. Treaties concerning things that are not naturally due. Of treaties equal.

Treaties equal are thoſe in which the contracting parties promiſe the ſame things, or things that are equivalent, or, in ſhort, that are equitably proportioned, ſo that their condition is equal. Such is, for example, a defenſive alliance, in which they reciprocally ſtipulate for the ſame ſuccours. Such is an offenſive alliance, in which it is agreed that each of the allies ſhall furniſh the ſame number of veſſels, the ſame number of troops, of cavalry and infantry, or an equivalent in veſſels, in troops, in artillery, or in money. Such is alſo a league in which the contingent of each of the allies is regulated in proportion to the intereſt he takes or may have in the deſign of the league. Thus the emperor and the king of England, in order to engage the ſtates-general of the United Provinces to accede to the treaty of Vienna of the 16th of March 1751, conſented that the republic ſhould only promiſe her allies ſuccour of four thouſand foot and a thouſand horſe, though they engaged to furniſh the republic in caſe it was attacked, each with eight thouſand foot and four thouſand horſe. We ought alſo to place in the rank of equal treaties, thoſe that declare that the allies ſhall make a common cauſe and act with all their forces. Though, in fact, their forces are not equal they may well be conſidered as equal.

Equal treaties may be ſubdivided into as many kinds as the ſovereigns have different tranſactions between them. Thus they treat of the conditions of commerce, of their mutual defence, of aſſociations in war, of the paſſage

they ſhall reciprocally grant to each other, or refuſe to the enemies of their ally; they engage not to build fortreſſes in certain places, &c. But it would be uſeleſs to enter into theſe particulars: generals are ſufficient, and are eaſily applied to particular caſes.

§ 173. The obligation of preſerving equality in treaties.

Nations not being leſs obliged than individuals to have a regard to equity, they ought, as much as poſſible, to preſerve equality in their treaties. When therefore the parties are in ſuch a ſtate as to obtain the ſame reciprocal advantages, the law of nature requires that their treaties ſhould be equal, at leaſt, if there is not ſome particular reaſon to deviate from that equality; ſuch would be, for inſtance, gratitude for a former benefit, the hope of becoming inviolably attached to a nation, from ſome motive which influences one of the contracting parties to conclude the treaty, &c. And even, if we judge rightly, the conſideration of this particular reaſon reſtores to the treaty that equality which ſeems to be taken from it by the difference of the things promiſed.

I ſee thoſe pretended great politicians ſmile, who place all their ſubtilty in circumventing thoſe with whom they treat, and regulating the conditions of the treaty in ſuch a manner, that all the advantage ſhall accrue to their maſters. Far from bluſhing at a conduct ſo contrary to equity, to rectitude, and natural honeſty; they make it their glory, and pretend to merit the name of great negociators. How much do men in a public character glory in what would diſhonour an individual? The private man, if he is without conſcience, alſo laughs at the rules of morality and juſtice; but he laughs in ſecret; it would be dangerous and prejudicial to him publickly to make a mock of them; the powerful abandon more openly the honeſt for the uſeful. But it frequently happens, for the happineſs of the human race, that this pretended utility becomes fatal to them; and even among ſovereigns, candour and rectitude are found to be their ſafeſt politics. All the ſubtilties, all the ſhufflings of a famous miniſter on

occaſion

occaſion of a very intereſting treaty with reſpect to Spain, turned at length to his confuſion, and the damage of his maſter; while the good faith, the generoſity of England towards her allies, procured her an immenſe credit, and raiſed her to the higheſt point of influence and reſpect.

§ 174. The difference between equal treaties and equal alliances.

When people ſpeak of equal treaties, they have commonly in their minds a double idea of the equality of the engagement and the equality of the dignity of the contracting parties. It is neceſſary to take away every thing that may appear equivocal, and for this purpoſe to diſtinguiſh between *equal treaties* and *equal alliances*. *Equal treaties* are thoſe where equality is kept in promiſes, as we have juſt explained them (§ 172.); and *equal alliances* thoſe where equal treats with equal, forming no difference in the contracting parties, or, at leaſt, admitting no ſuperiority too plainly pointed out; but only ſome pre-eminence of honours and rank. Thus kings treat with the emperor as equal with equal, though they without difficulty allow him the firſt place. Thus great republics treat with kings as equal with equal, in ſpite of the pre-eminence they at preſent allow them. Thus every true ſovereign ought to treat with the moſt powerful monarch, ſince they are as really ſovereigns, and as independent as himſelf (ſee above § 37 of this Book.).

§ 175. Of unequal treaties, and unequal alliances.

Unequal treaties are thoſe in which the allies do not promiſe the ſame things, and the *alliance* is *unequal* when it makes a difference in the dignity of the contracting parties. It is true, that moſt commonly an unequal treaty will be at the ſame time an unequal alliance; great potentates being ſeldom accuſtomed to give more than is given to them, to promiſe more than is promiſed to them, if they are not rewarded for it on the ſide of glory and honour: on the contrary, a weak ſtate does not ſubmit to burdenſome conditions without being obliged alſo to acknowledge the ſuperiority of its ally.

Thoſe unequal treaties that are at the ſame time unequal alliances, are divided into two kinds: the firſt thoſe

where *the inequality is found on the ſide of the moſt conſiderable power*; and the ſecond comprehends treaties where *the inequality is on the ſide of the inferior power*.

In the firſt kind, without attributing to the more powerful any right over the more weak, there is given him only a ſuperiority of honours and reſpect. We have treated of this in Book I. § 5. Frequently a great monarch reſolving to engage a weak ſtate in his intereſt, makes it advantageous conditions, or greater than thoſe it would ſtipulate for itſelf; but he claims at the ſame time a ſuperiority of dignity, and requires reſpect from his ally. This laſt particular renders *the alliance unequal*. To this we ought to pay attention; for we ought not to confound with theſe alliances, thoſe in which equal treats with equal, though the moſt powerful of the allies, for particular reaſons, gives more than he receives, promiſes his aſſiſtance gratis, without requiring a return, more conſiderable ſuccours, or even the aſſiſtance of all his forces: here the alliance is equal; but the treaty is unequal; if it is not always true to ſay that he who gives moſt having a greater intereſt in concluding the treaty, this conſideration reſtores the equality. Thus the French finding themſelves embarraſſed in a war with the houſe of Auſtria, Cardinal de Richelieu reſolving to humble that formidable power, he, like an able miniſter, concluded a treaty with Guſtavus Adolphus, in which all the advantage appeared to be on the ſide of the Swede. On conſidering only the ſtipulation, we ſhould have ſaid, that the treaty was unequal; but the advantages France derived from it, largely compenſated for that inequality. The alliance of France with the Swiſs, if we ſtop at the ſtipulation, is an *unequal* treaty; but the valour of the Swiſs troops has for a long time reſtored the equality: the difference of their intereſts, and wants unites theſe together. France, often involved in bloody wars, has received eſſential ſervices from the Swiſs: the Helvetic body, without ambition, without a ſpirit of conqueſt,

may

may live in peace with the whole world: they have nothing to fear, ſince they have made the ambitious feel, that the love of liberty gives the nation ſufficient ſtrength to defend its frontiers. This alliance may at certain times appear unequal. Our forefathers ſtudied ceremonials but little. Though in reality, and eſpecially ſince the abſolute independence of the Swiſs is acknowledged by the empire itſelf, the alliance is certainly equal; notwithſtanding the Helvetic body, without difficulty, pays to the king of France, all the pre-eminence which the modern cuſtoms of Europe attribute to crowned heads, and eſpecially to great monarchs.

Treaties *in which the inequality is found on the ſide of the inferior powers*, that is, thoſe which impoſe on the more weak, more extenſive obligations, or greater burdens; or obliges them to perform things diſagreeable and painful; theſe unequal treaties, I ſay, are always at the ſame time unequal alliances; for the more weak never ſubmit to burdenſome conditions, without being obliged alſo to acknowledge the ſuperiority of the ally. Theſe conditions are commonly impoſed by the conqueror, or dictated by neceſſity, which obliges a weak ſtate to ſeek the protection or aſſiſtance of another more powerful, and by this means it acknowledges its ſuperiority. Beſides, this forced inequality in a treaty of alliance, ſwallows up, and depreſſes its dignity, at the ſame time that it exalts that of the more powerful ally. It alſo happens that the more weak, not being able to promiſe the ſame ſuccours as the more powerful, it becomes neceſſary that it ſhould make a compenſation for it by engagements that degrade it below its ally, and often muſt even ſubmit, in certain reſpects, to his will. Of this kind are all the treaties where the more weak engages not to make war without the conſent of the more ſtrong, and to have the ſame friends, and the ſame enemies, to maintain, and pay a reſpect to its majeſty, to have no fortreſſes in certain places, not to trade nor raiſe ſoldiers in certain free countries, to deliver up its

veſſels

veſſels of war, and not to build others, as the Carthaginians did to the Romans; to keep up only a certain number of troops, &c.

Theſe *unequal alliances* are ſubdivided into two kinds; they *either degrade the ſovereignty*, or *they do not*. We have touched ſlightly on this in Book I. Chap. I. and XVI.

The ſovereignty ſubſiſts entire when none of the rights, of which it is conſtituted, is conveyed to the ſuperior ally, or rendered dependent on his will in the exerciſe that may be made of them. But the ſovereignty is degraded when any of its rights are ceded to an ally, or even if the uſe of them is merely rendered dependent on the will of that ally. For example, the treaty does no injury to the ſovereignty, if the weaker ſtate only promiſes not to attack a certain nation without the conſent of its ally. By this means it does not ſtrip itſelf of its right, nor does it ſubmit to him the exerciſe of it; it only conſents to a reſtriction in favour of its ally; and in this manner it no more diminiſhes its liberty, than is neceſſarily done in all promiſes. People every day lay themſelves under ſuch reſtraints in alliances that are perfectly equal. But to engage not to make war againſt any one whatſoever without the conſent or permiſſion of an ally, who on his ſide does not make the ſame promiſe, is to contract an unequal alliance with diminution of ſovereignty; for it is to deprive him of one of the moſt important parts of the ſovereign power, by committing the exerciſe of it to another's will. The Carthaginians having in the treaty that terminated the ſecond Punic war, promiſed not to make war on any ſtate without the conſent of the Romans; were then, for that reaſon, conſidered as dependent on the Romans.

§ 176. How an alliance with diminution of ſovereignty may annul preceding treaties.

When a people are forced to receive laws, they may legally renounce their preceding treaties, if he with whom they are conſtrained to enter into an alliance requires it from them. As they then loſe a part of their ſovereignty,

ſovereignty, their ancient treaties fall with the powers that had concluded them. This is a neceſſity that cannot be imputed to them, and ſince they had a right to ſubmit themſelves abſolutely, and to renounce all ſovereignty, if it became neceſſary for their preſervation; by a much ſtronger reaſon, they have a right, under the ſame neceſſity, to abandon their allies. But a generous people will try every reſource before they will ſubmit to ſo ſevere and humbling a law.

§ 177. We ought to avoid as much as poſſible making unequal alliances.

In general, every nation ought to be jealous of its glory, careful of maintaining its dignity, and preſerving its independence; it ſhould therefore be induced by nothing but extremity, or the moſt important reaſons, to contract an unequal alliance. This particularly relates to treaties where the inequality is found on the ſide of the weaker ally, and ſtill more to thoſe unequal alliances that degrade the ſovereignty: men of courage will receive them only from the hand of neceſſity.

§ 178. The mutual duties of nations with reſpect to unequal alliances.

Whatever a ſelf-intereſted politician may ſay, we ſhould either abſolutely deliver ſovereigns from the authority of the law of nature, or agree that they are not allowed to oblige, without juſt reaſon, the weaker ſtates to ſubmit to them their dignity, much leſs their liberty by an unequal alliance. Nations owe to each other the ſame aſſiſtance, the ſame reſpect, the ſame friendſhip, as individuals living in a ſtate of nature. Far from ſeeking to humble the weak, and to deſpoil them of their moſt precious advantages, they will reſpect, they will maintain their dignity and their liberty, if they are inſpired by virtue more than by pride; if they are more moved by principles of integrity than by a mean ſelf-intereſt; what do I ſay? If they have ſuch a degree of underſtanding as to know their true and real intereſt. Nothing more firmly ſecures the power of a great monarch than his regard to all ſovereigns. The more careful he is of offending the weak, the greater eſteem they will have for him, and the more they will revere him; they love a power who makes them

them feel his ſuperiority only by his benefits; they fix themſelves to him as to their ſupport, and he becomes the arbiter of nations. Had he behaved with pride, he would have been the object of their jealouſy and fear, and perhaps have one day ſunk under their united efforts.

§ 179. In thoſe that are unequal on the moſt powerful ſide.

But as the weak ought, in their neceſſity, to accept with gratitude the aſſiſtance of the more powerful, and not to refuſe him the honours, the reſpect, that flatters him who receives them, without degrading him by whom they are rendered; ſo nothing is more conformable to the law of nature, than aſſiſtance generouſly given by the more powerful ſtate without requiring a return; or, at leaſt, an equivalent. And it is found here, that advantage is obtained by the practice of duty. Good policy will not permit a great power to ſuffer the oppreſſion of the ſmall ſtates in his neighbourhood. If he abandons them to the ambition of a conqueror, this laſt will ſoon become formidable to himſelf. Thus ſovereigns who are commonly faithful enough with reſpect to their own intereſt, ſeldom fail to attend to this maxim. Hence thoſe alliances ſometimes againſt the houſe of Auſtria, ſometimes againſt its rival, according as the power of one or the other preponderates. Hence that balance of power the object of perpetual negociations and wars.

When a weak and poor nation has occaſion for another kind of aſſiſtance, when it is afflicted by a famine, we have ſeen (§ 5.) that thoſe who have proviſions ought to furniſh them at a juſt price; it would be noble to afford them at a low rate, or to make a preſent of them if a nation is incapable of paying for them. To make it buy them by an unequal alliance, and eſpecially at the expence of its liberty, to treat them as Joſeph formerly treated the Egyptians, would be a ſeverity almoſt as dreadful, as ſuffering them to periſh with hunger.

§ 180. How inequality of treaties and alliances may be conformable to the law of nature.

But there are caſes where the inequality of treaties and alliances, dictated by ſome particular reaſons, is not contrary to equity, nor conſequently to the law of nature. Theſe

These cases are in general all those in which the duties of one nation towards itself, or its duty to others, invite it to deviate from equality. For instance, if the sovereign of a weak state should without necessity build a fortress, which he would be incapable of defending, in a place where it might become very dangerous to his neighbour, if ever it fell into the hands of a powerful enemy; this neighbour may oppose the construction of the fortress; and if it is not convenient to pay for the compliance he demands, he may obtain it by threatening to break up the roads of communication, to forbid all commerce, to build fortresses, or to keep an army on the frontier, to consider that little state as suspicious, &c. He imposes indeed an unequal condition; but this is authorised by the care of his own safety. In the same manner he may oppose the forming of a highway, that would open to an enemy an entrance into his state. War might furnish us with a multitude of other examples. But people frequently abuse rights of this nature; it requires as much moderation as prudence to avoid turning them into oppression.

The duties towards others sometimes also counsel and authorise this inequality in a contrary sense, since without this a sovereign may be accused of being wanting to himself or to his people. Thus gratitude, the desire of shewing his sensibility for a benefit, may induce a generous sovereign to enter into an alliance with joy, and to give in the treaty more than he receives.

§ 181. Of inequality imposed by way of punishment.

Or he may with justice impose the conditions of an unequal treaty, or even an unequal alliance, by way of punishment, in order to punish an unjust aggressor, and to put him out of a condition of easily hurting him afterwards. Such was the treaty to which Scipio Africanus, forced the Carthaginians to submit, after he had conquered Hannibal. The conqueror often gives such laws; and by this means he neither offends justice nor equity, if he remains within the bounds of moderation, after he has triumphed in a just and necessary war.

The

§ 182. Other kinds of which we have spoken elsewhere.

The different treaties of protection, those by which a state renders itself tributary or feudatory to another, form so many kinds of unequal alliances. But we shall not repeat here, what we have said in Book I. Chap. I. and XVI.

§ 183. Of personal and real treaties.

By another general division of treaties or alliances they are distinguished into *personal* and *real*: the first are those that relate to the person of the contracting parties, and are restrained and in a manner attached to them. *Real alliances* relate only to the things of which they treat, without any dependence on the person of the contracting parties.

The *personal alliance* expires with him who contracted it.

The *real alliance* is affixed to the body of the state, and subsists as long as the state, if the time of its duration is not limited.

It is of great use not to confound these two sorts of alliances. Therefore sovereigns are at present accustomed to explain themselves in such a manner as to leave no uncertainty in this respect, and this is doubtless the best and safest method. In want of this precaution, the matter of the treaty, or the expressions in which it is conceived may furnish the means of discovering, whether it be real or personal. Let us give some general rules on this subject.

§ 184. The names of contracting parties in the treaty do not render it personal.

In the first place, from naming in the treaty the sovereigns who contract, we ought not to conclude that the treaty was personal, for the name of the sovereign who actually governs is often inserted with the sole view of shewing, with whom it is concluded, and not to make known that they have treated with him personally. This is an observation of the civilians Pedius and Ulpian[b], repeated by all authors.

§ 185. An alliance made by a republic is real.

Every alliance made by a republic is in its own nature real, for it relates only to the body of the state. When a free people, a popular state, or an Aristocratical republic concludes a treaty, it is the state itself that contracts; and its engagements do not depend on the lives of those

[b] *Digest. Lib.* II. *Tit.* XIV. *De Pactis. Leg.* VII. § 8.

who

who were only the inſtruments: the member of the people or of the regency chan[illegible] and ſucceed each other; but the ſtate is always the ſame.

Since then ſuch a treaty directly relates to the body of the ſtate, it ſubſiſts, though the form of the republic happens to be changed, and though it ſhould be even transformed into a monarchy. For the ſtate and the nation are always the ſame, whatever changes are made in the form of the government, and the treaty concluded with the nation, remains in force as long as the nation exiſts. But it is manifeſt that we ought to except from this rule all the treaties that relate to the form of the government. Thus two popular ſtates that have treated expreſsly, or that appear evidently to have treated with the view of maintaining themſelves in concert in their ſtate of liberty and popular government, ceaſe to be allies at the very moment when one of them has ſubmitted to be governed by a ſingle perſon.

§ 186. Of treaties concluded by kings or other monarchs.

Every public treaty concluded by a king or by any other monarch, is a treaty of the ſtate; it lays under an obligation the entire ſtate, the nation which the king repreſents, and whoſe power and right he exerciſes. It ſeems then at firſt that every public treaty ought to be preſumed real, as concerning the ſtate itſelf. There is no doubt with reſpect to the obligation to obſerve the treaty, this relates only to its duration. Now there is often room to doubt whether the contracting parties have intended to extend the reciprocal engagements beyond the term of their own lives, and to bind their ſucceſſors. Conjunctures change; a burden that is to-day light, may in other circumſtances become inſupportable or too heavy: the manner of thinking among ſovereigns is no leſs variable; and there are things which it is convenient that each prince ſhould diſpoſe of freely according to his own plan. There are others that are freely granted to a king and would not be permitted to his ſucceſſor. It is neceſſary then to conſider the terms of the treaty, or the

deſign

design of it, in order to discover the intentions of the contracting powers.

§ 187. Treaties perpetual and for a certain time.

Treaties that are perpetual, and those made for a determinate time, are real; since their duration does not depend on the lives of the contracting parties.

§ 188. Treaties made for the king and his successors.

In the same manner when a king declares in the treaty that it is made for himself and his successors, it is manifest that the treaty is real. It is affixed to the state and made in order to last as long as the kingdom itself.

§ 189. Treaties made for the good of the kingdom.

When a treaty expressly declares, that it is made for the good of the kingdom, it is a manifest indication that the contracting powers have not intended to make it depend on the duration of their lives; but rather to affix it to the duration of the kingdom itself: the treaty is then real.

Independently even of this express declaration, when a treaty is concluded to procure an advantage to the state that will always subsist, there is no reason to believe that the prince who has concluded it, was willing to limit it only to the duration of his life. Such a treaty ought then to be considered as real, unless very strong reasons shew, that he with whom it was concluded, granted the advantage to which it relates only out of regard to the prince then reigning; and as a personal favour; in this case the treaty terminates with the life of the prince, the reason of the concession expiring with him. But this reserve is not easily presumed; for it would seem that if contracting parties had this in their view, they would have expressed it in the treaty.

§ 190. How presumption ought to be founded in doubtful cases.

In case of doubt, when nothing clearly establishes, either the personality or the reality of a treaty, it ought to be presumed real if it turns on things that are favourable, and personal in matters that are odious. The things favourable are here those that tend to the common advantage of the contracting powers, and that equally favour the two parties; things odious are those that burden one

party

party alone, or that are a greater grievance to one than the other. We ſhall ſpeak of them more at large in the chapter on the interpretation of treaties. Nothing is more conformable to reaſon and equity than this rule: whenever certainty is wanting in the affairs of men, we muſt have recourſe to preſumption. Now if the contracting powers have not explained themſelves, it is natural when it relates to things favourable, and equally advantageous to the two allies, to think that they intended to make a real treaty, as one moſt uſeful to their reſpective kingdoms; and if we deceive ourſelves in this preſumption, we do no injury either to the one or the other. But if the engagement has ſomething odious, if one of the contracting ſtates finds itſelf overburdened, how can it be preſumed that a prince who entered into ſuch engagements, was willing to lay that burden for ever upon his kingdom? Every ſovereign is preſumed to deſire the ſafety and advantage of the ſtate with which he is entruſted, it cannot then be ſuppoſed, that he has conſented to load it for ever with a burdenſome obligation. If neceſſity has made it a law to him, it was the buſineſs of his ally to make him explain himſelf clearly, and it is probable he would not have failed to do it, knowing that men, and particularly ſovereigns, ſeldom ſubmit to heavy and diſagreeable burdens, if they are not in due form obliged to it. If it happens then that the preſumption is a miſtake, and makes him loſe ſomething of his right, it is a conſequence of his own negligence. Let us add, that if neither the one nor the other ought to loſe his right, equity will be leſs wounded by the loſs which this will ſuffer from a gain which he could only obtain by the damage he intended the other: this is the famous diſtinction *de lucro captando*, and *de damno vitando*.

We, without difficulty, place equal treaties of commerce in the number of thoſe that are favourable, ſince they are in general advantageous and very conformable to the law of nature. As to alliances made on account of

of war, Grotius says with reason, that "defensive alliances have a more favourable aspect, and those that are offensive have something in them that approaches nearer to what is burdensome or odious*."

We could not dispense with slightly mentioning in a few words these discussions, in order that we might not leave here a disagreeable void. However they are but of little use in practice; sovereigns at present generally using the wise precaution of clearly determining the duration of their treaties. They treat for themselves and their successors, for themselves and their kingdoms for perpetuity, for a certain number of years, &c. Or they treat only for the time of their reign, for an affair peculiar to themselves, or their families, &c.

§ 191. That the obligations and rights resulting from a real treaty pass to the successors.

Since public treaties, and even those that are personal, concluded by a king or by any other sovereign who is invested with sufficient power, are treaties of state and obligatory with respect to the whole nation (§ 186.); real treaties, made to subsist independently of the person who has concluded them, doubtless, oblige his successors; and the obligation imposed on the state passes successively to all its conductors, in proportion as they assume the public authority. It is the same with respect to the rights acquired by these treaties: they are acquired for the state, and successively pass to its conductors.

It is at present a pretty general custom for the successor to confirm, or renew even real alliances, concluded by his predecessors: and prudence requires, that this precaution should not be neglected, since men lay a greater stress on an obligation they themselves have contracted, than on one imposed on them by others, or to which they have only tacitly agreed. This is because they believe their word engaged in the first, and only their conscience in the other.

§ 192. Of treaties accomplished once for all, and perfected.

The treaties that have no relation to repeated oaths, but to transitory acts, and that are suddenly concluded;

* *De Jure Belli & Pacis, Lib.* II. *Cap.* XVI. § 16.

these

these treaties, if it is not proper to call them by another name (see § 153.): these conventions, these pacts, which are accomplished once for all, and not by successive acts, are no sooner executed, than they are completed and perfected. If they are valid, they have in their own nature a perpetual and irrevocable effect: we have not them in view when we inquire, whether a treaty be real or personal. Puffendorf[d] gives us rules in this inquiry, "1. That the successors ought to keep "the treaties of peace concluded by their predecessors. "2. That a successor should keep all the lawful conven- "tions, by which his predecessor has transferred any "right to a third." This is apparently leaving the question; it is only saying that what is done with validity by a prince, cannot be annulled by his successors: who doubts it? The treaty of peace is in its own nature made to last perpetually, and as soon as it is once duly concluded and ratified, it is an affair that is perfected; it must be accomplished on both sides, and observed according to its tenour. If it is executed upon the spot, every thing is concluded. But if the treaty contains engagements with respect to successive and repeated oaths, it will be always proper to examine, according to the rules we have laid down, whether it be in this respect real or personal; whether the contracting parties have resolved to oblige their successors to swear to them; or whether they have only promised for the time of their reign. In the same manner, as soon as a right is transferred by a lawful convention, it no longer belongs to the state that has ceded it: the affair is concluded and terminated. But if the successor finds any fault in the act and proves it, he is not to pretend that the convention is not obligatory with respect to him, and refuse to accomplish it; he is to shew, that it has not been made; for an act defective and invalid is null, and the same as if it never had been.

[d] Law of Nature and Nations, Book VIII. Chap. IX. § 8.

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§ 193. Of treaties already accomplished on the one part.

The third rule given by Puffendorf is no less useless with respect to this question, it declares, "That if the "other ally having already executed something to which "he was bound by virtue of the treaty, the king hap- "pening to die before he had accomplished, in his turn, "what he had engaged to perform, his successor is indis- "pensably obliged to perform it. For what the other ally "has executed under the condition of receiving an equi- "valent, having turned to the advantage of the state, or "at least having been done with that view, it is clear, "that if the one does not perform what he has stipulated, "the other then acquires the same right as the man who "has paid what he did not owe, and therefore the suc- "cessor is obliged to make him an entire recompense, "for what he has done or given, or to adhere himself to "what his predecessor has engaged to perform." All this, I say, is foreign to our question. If the alliance is real, it subsists notwithstanding the death of one of the contracting parties; if it is personal, it expires with them, or with one of them (§ 183.). But when a personal alliance comes to be furnished in this manner, the knowing to what one of the allied states is bound, in case the other has already executed something by virtue of the treaty, is another question, and is to be determined by other principles. It is necessary to distinguish the nature of what has been done to accomplish the treaty. If it relates to those determined and certain loans which they have reciprocally promised each other by way of an equivalent, there is no doubt that he who has received, ought to give what he has promised in return, if he would adhere to the agreement, and is obliged to adhere to it; if he is not obliged, and is unwilling to adhere to it, he ought to restore what he has received, to put things into their primitive state; or to recompense the ally who has given them. To act otherwise would be to detain what belongs to another. This is not the case of the man who has paid what he did not owe, but of one who has paid before

before-hand for a thing that has not been delivered to him. But if the perſonal treaty requires uncertain and contingent loans that are to be accompliſhed, as occaſions offer, theſe promiſes are not obligatory except in caſes where they are to be fulfilled when preſented; the return of the like aſſiſtance is alſo only due upon occaſion, and the end of the alliance being anſwered, nobody is bound to any thing. In a defenſive alliance, for inſtance, two kings reciprocally promiſe each other a gratuitous aſſiſtance for the term of their lives: one of them is attacked: he is ſuccoured by his ally, and dies before he has an opportunity to ſuccour him in his turn; the alliance is ended, and the ſucceſſor of the deceaſed is not obliged to perform any thing, except his being certainly bound in gratitude to make a ſuitable return to the ſovereign, who has given a ſalutary aſſiſtance to the ſtate. And it muſt not be believed that the ally, who has given the aſſiſtance without receiving any, will think himſelf injured by the alliance. This treaty was one of thoſe adventitious contracts where the advantages or diſadvantages depend on fortune: he might have gained as he has loſt.

We might here propoſe another queſtion. The perſonal alliance expiring at the death of one of the allies, if the ſurvivor thinking it ought to ſubſiſt with the ſucceſſor, fulfils the treaty on his part, defends his country, ſaves ſome of his fortreſſes, or furniſhes proviſions for his army, what ought the ſovereign to do that is thus ſuccoured? He ought, doubtleſs, either to ſuffer the alliance to ſubſiſt, as the ally of his predeceſſor has believed that it ought to do, and this will be a tacit renewal and extenſion of the treaty; or to pay for the real ſervice he has received, according to a juſt eſtimation of its importance, if he would not continue that alliance. This then would be the caſe in which we ſhould ſay with Puffendorf, that he who has rendered ſuch a ſervice, has acquired the right of a man who has paid what he did not owe.

§ 194. The personal alliance expires if one of the contracting powers ceases to reign.

The duration of a personal alliance being restrained to the person of the contracting sovereigns, if one of them ceases to reign from any cause whatsoever, the alliance is ended: for they have contracted in quality of sovereigns, and he who ceases to reign, no longer exists as a sovereign, though he lives still as a man.

§ 195. Of treaties in their own nature personal.

Kings do not always treat directly and solely for their kingdoms; sometimes in virtue of the power they have in their hands, they make treaties relative to their own persons, or their families; and this they may lawfully do; the safety and advantage of the sovereign, properly understood, consisting in the welfare of the state. These treaties are personal in their own nature, and perish with the king. Such is an alliance made for the defence of the king and his family.

§ 196. Of an alliance concluded for the defence of the king and the royal family.

It is asked, if that alliance subsists with the king and the royal family, when by some revolution they are deprived of their crown? We have lately remarked, (§ 194.) that a personal alliance expires with the reign of him who contracted it: but that is to be understood of an alliance with the state, limited as to its duration, to the reign of the contracting king. This, of which we are here speaking, is of another nature. For though it binds the state, since it is bound by all the public acts of its sovereign, it is made directly in favour of the king, and his family; it would therefore be absurd for it to terminate at the moment when they have need of it, and at an event against which it was made. Besides, the king does not lose his quality merely by the loss of his kingdom. If he is stripped of it unjustly by an usurper, or by rebels, he preserves his right, in the number of which are his alliances.

But who shall judge, if the king be dethroned lawfully or by violence? An independent nation acknowledges no judge. If the body of the nation declares the king deprived of his rights by the abuses he has made of them, and deposes him, it may justly do it when its grievances

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are well founded, and no other power has a right to cenſure it. The perſonal ally of this king ought not then to aſſiſt him againſt the nation that has made uſe of its right in depoſing him: if he attempts it, he injures that nation. England declared war againſt Louis XIV. in the year 1688, for ſupporting the intereſt of James II. who was depoſed in form by the nation. The ſame country declared war againſt him a ſecond time at the beginning of the preſent century, becauſe that prince acknowledged the ſon of the depoſed James, under the name of James III. In doubtful caſes, and when the body of the nation has not pronounced, or has not pronounced freely, a ſovereign may naturally ſupport and defend an ally, and it is then that the voluntary law of nations ſubſiſts between different ſtates. The party that has driven out the king, pretends to have right on its ſide; this unhappy king and his ally, flatter themſelves with having the ſame advantage, and as they have no common judge upon earth, they have no other method to take, but to apply to arms to terminate the diſpute: they therefore engage in a formal war.

In ſhort, when the foreign prince has faithfully fulfilled his engagements towards an unfortunate monarch, when he has done in his defence, or to procure his reſtoration, all he was obliged to perform, in virtue of the alliance; if his efforts are ineffectual, the dethroned prince cannot require him to ſupport an endleſs war in his favour, or expect that he will eternally remain the enemy of the nation, or of the ſovereign who has deprived him of the throne. He muſt think of peace, abandon the ally, and conſider him as having himſelf abandoned his right, through neceſſity. Thus Louis XIV. was obliged to abandon James II. and to acknowledge King William, though he had at firſt treated him as an uſurper.

§ 197. What is the obligation of a real alliance, when the king who is the ally is driven from the throne.

The ſame queſtion preſents itſelf in real alliances, and in general, in all alliances made with the ſtate, and not in particular with a king, for the defence of his perſon. An ally ought doubtleſs to be defended againſt every invaſion, againſt every foreign violence, and even againſt his rebellious ſubjects; in the ſame manner a republic ought to be defended againſt the enterpriſes of one who attempts to deſtroy the public liberty. But it ought to be remembered, that an ally of the ſtate, or the nation is not its judge. If the nation has depoſed its king in form, if the people of a republic have driven out their magiſtrates, and ſet themſelves at liberty, or acknowledged the authority of an uſurper, either expreſsly or tacitly; to oppoſe theſe domeſtic regulations, by diſputing their juſtice or validity, would be to interfere in the government of the nation, and to do it an injury (ſee § 54. and following of this book.) The ally remains the ally of the ſtate, notwithſtanding the change that has happened in it. However, when this change renders the alliance uſeleſs, dangerous or diſagreeable, it may renounce it: for it may ſay upon a good foundation, that it would not have entered into an alliance with that nation, had it been under the preſent form of government.

We may ſay here, what we have ſaid on a perſonal alliance: however juſt the cauſe of that king may be, who is driven from the throne, either by his ſubjects or by a foreign uſurper; his allies are not obliged to ſupport an eternal war in his favour. After having made ineffectual efforts to reſtore him, they muſt at length give peace to their people, and come to an accommodation with the uſurper, and for that purpoſe treat with him as with a lawful ſovereign. Louis XIV. exhauſted by a bloody and unſucceſsful war, offered at Gertruidenburgh, to abandon his grandſon, whom he had placed on the throne of Spain: and when affairs had changed their appearance, Charles of Auſtria, the rival of Philip, ſaw himſelf, in his turn, abandoned by his allies. They grew weary of exhauſting their

their ſtates in order to give him the poſſeſſion of a crown which they believe to be his due, but which to all appearance they ſhould never be able to procure for him.

CHAP. XIII.

Of the Diſſolution and Renewal of Treaties.

§ 198. Of the expiration of the term of alliances.

THE alliance is ended as ſoon as the term is expired. This term is ſometimes fixed, when an alliance is made for a certain number of years, and ſometimes it is uncertain, as in perſonal alliances, the duration of which depends on the lives of the contracting powers. The term is likewiſe uncertain when two or more ſovereigns form an alliance, with a view to ſome particular affair; for inſtance, to drive a barbarous nation from a country it had invaded, to reſtore a ſovereign to his throne, &c. The end of this alliance is affixed to the completion of the enterpriſe for which it was formed. Thus in the laſt example, when the ſovereigh is reſtored, and ſo firmly ſeated on his throne, that he may remain in the tranquil poſſeſſion of it, the alliance only formed for his reſtoration is ended. But if the enterpriſe does not ſucceed, the alliance is terminated, when they acknowledge the impoſſibility of executing it; for it is neceſſary to renounce an enterpriſe, when its execution is perceived to be impoſſible.

§ 199. Of the renewal of treaties.

A treaty made for a time may be renewed by the common conſent of the allies, which is ſhewn either in an expreſs manner, or tacitly. When the treaty is expreſsly renewed, it is the ſame as if one altogether new was made.

The tacit renewal is not eaſily preſumed, for engagements of this importance well deſerve an expreſs conſent. The tacit renewal can then only be founded on acts of ſuch a nature, that cannot be performed but in virtue of the treaty. Still the thing is not without difficulty; for according

according to the circumſtances and nature of the act, they may be able to found only a ſimple continuation, or an extenſion of the treaty: this is very far from a renewal, eſpecially as to the term. For example, England has a treaty of ſubſidies with a prince of Germany, who is to maintain, during ten years, a ſtated number of troops to be at the diſpoſal of that crown, on condition of his receiving every year a certain ſum. The ten years being expired, the King of England cauſes the ſum ſtipulated for one year to be paid, the ally receives it: the treaty is tacitly continued for one year; but it cannot be ſaid to be renewed; for what has paſſed that year, does not impoſe an obligation of doing as much for ten years following. But ſuppoſing the ſovereign has agreed with a neighbouring ſtate to give him a million for having a right to keep a garriſon in one of his ſtrong places during ten years, the term being expired, inſtead of withdrawing his garriſon he delivers a new million, and his ally accepts it: the treaty in this caſe is tacitly renewed.

When the term for which the treaty was made is expired, each of the allies is perfectly free, and may accept or refuſe to renew it, as he ſhall think proper. However, it muſt be confeſſed, that after having reaped almoſt all the advantages of a treaty, to refuſe to renew it, without ſtrong and juſt reaſons, when he believes he ſhall have no more need of it, and when he foreſees that the time is come for his ally, in his turn, to reap advantages from it, this conduct would ſhew but little honeſty, it would be unworthy of the generoſity which ſo well becomes ſovereigns, and very diſtant from theſe ſentiments of gratitude and friendſhip that are due to an injured and faithful ally. It is but too common to ſee great powers on their elevation neglect thoſe who have aſſiſted them to arrive at it.

§ 200. How a treaty is broken when it is violated by one of the contracting powers.

Treaties contain promiſes that are perfect and reciprocal. If one of the allies fails in his engagements, the other may conſtrain him to fulfil them; this is the right derived

derived from a perfect promiſe. But if he has no other way than that of arms to conſtrain an ally to keep his word, it is ſometimes more expedient to diſengage himſelf from his promiſes, and to break the treaty. He has undoubtedly a right to do this, having promiſed only upon condition that his ally ſhall accompliſh, on his ſide, every thing he is obliged to perform. The ally offended or injured in what relates to the treaty, may then chuſe either to oblige the perfidious ally to fulfil his engagements, or declare the treaty broken, by the violation of it. Prudence and a wiſe policy muſt direct him what he ought to do on a particular occaſion.

§ 201. The violation of one treaty does not break another.

But when the allies have two or more treaties, different and independent of each other, the violation of one of the treaties, does not directly diſengage the party injured, from the obligation he has contracted in the others. For the promiſes contained in theſe, do not depend on thoſe included in the violated treaty. But the offended ally may menace him who fails in one treaty to renounce, on his ſide, all the others by which they are united, and put his menace in force, if the other pays no regard to his remonſtrances. For if any one ravages from me, or refuſes to allow me my right, I may, in a ſtate of nature, in order to oblige him to do me juſtice, to puniſh him, or to indemnify myſelf, deprive him alſo of ſome of his rights, or ſeize and detain them till I have obtained intire ſatisfaction. But if arms are taken up, to obtain juſtice for this violated treaty, the offended begins by ſtripping his enemy of all the rights which he had acquired by treaty: and we ſhall ſee, in treating of war, that he may do this with juſtice.

§ 202. That the violation of one article in a treaty may occaſion the breaking the whole.

Some [a] would extend what we have juſt ſaid to the ſeveral articles of a treaty that have no connection with the article that has been violated, ſaying we ought to conſider theſe different articles, as ſo many particular trea-

[a] *See Wolfius Jus Gent.* § 432.

ties

ties concluded at the ſame time. They pretend therefore, that if one of the allies breaks an article of the treaty, the other has not immediately a right to break the intire treaty, but that he may either refuſe, in his turn, what he had promiſed with a view to the violated article, or oblige his ally to fulfil his promiſes, if that may be done, if not to repair the damage; and for this purpoſe it is permitted to threaten him to renounce the intire treaty: a menace that he may lawfully put in execution, if it be deſpiſed. Such is, doubtleſs, the conduct which prudence, moderation, the love of peace, and charity would commonly preſcribe to nations. Who will deny this, and madly advance that ſovereigns are allowed ſuddenly to have recourſe to arms, or only to break every treaty of alliance for the leaſt ſubject of complaint? But the caſe here is about a right, and not about the ſteps that ought to be taken to obtain juſtice; beſides, the principle upon which ſuch a deciſion is founded is abſolutely unſupportable. We cannot conſider the ſeveral articles of the ſame treaty as ſo many particular and independent treaties: for though we do not ſee the immediate connection between every one of theſe articles, they are all connected by this common relation, that the contracting powers paſs them with a view to each other, by way of compenſation. I ſhould never perhaps have paſſed this article, if my ally had not granted me another, which in its own nature has no relation to it. Every thing comprehended in the ſame treaty has then the force and nature of reciprocal promiſes, at leaſt if they are not excepted in due form. Grotius ſays very well, "that all the articles of a treaty "have the force of conditions, which by a default are "rendered null[b]." He adds that "this clauſe is "ſometimes inſerted, that the violation of ſome one of the "articles ſhall not break the whole, in order that one of the parties ſhould not get rid of his engagement on ac-

[b] *Grotius de Jure Belli & Pacis, Lib.* II. *Cap.* XV. § 15.

"count

" count of a ſmall offence." This precaution is extremely wiſe and very conformable to the care which nations ought to take of preſerving peace, and rendering their alliances durable.

§ 203. The treaty is void by the deſtruction of one of the contracting powers.

In the ſame manner, as when a perſonal treaty expires at the death of a king, the real treaty is aboliſhed, if one of the allied nations is deſtroyed; that is, not only if the men who compoſe it happen all to periſh, but alſo if it loſes, from any cauſe whatſoever, its national quality, or that of a political and independent ſociety. Thus when a ſtate is deſtroyed and the people are diſperſed, or when they are ſubdued by a conqueror, all their treaties periſh with the public power that had contracted them. But we ought not here to confound the treaties or alliances, which bearing the obligation of reciprocal advantages, can only ſubſiſt by the preſervation of the contracting powers, together with thoſe contracts that give a right acquired and completed, independently of every mutual advantage. If, for inſtance, a nation has ceded for ever to a neighbouring prince, the right of fiſhing in a river, or that of keeping a garriſon in a fortreſs, that prince does not loſe his right, even though the nation, from which he has received it, happens to be ſubdued, or paſſes, in any other manner, under a foreign dominion. His rights do not depend on the preſervation of that nation; it had alienated them, and he who has conquered it can only take what belonged to it. In the ſame manner, the debts of a nation, or thoſe for which the ſovereign has mortgaged ſome of his towns or provinces, are not expunged by the conqueſt. The King of Pruſſia, on acquiring Sileſia by conqueſt, and by the treaty of Breſlau, took upon himſelf the debts for which that province was engaged to the Engliſh merchants. In fact, he could only conquer there the rights of the houſe of Auſtria, and he could only take Sileſia as he found it at the time of the conqueſt, with its rights and burdens. To refuſe the payment of the debts of the country he had ſubdued, would

would have been to rob the creditors with whom he was not at war.

§ 204. Of the alliances of a ſtate that has at length paſſed under the protection of another.

Any nation or ſtate whatſoever not being able to make any treaty contrary to thoſe by which it is actually bound (§ 165.); it cannot put itſelf under the protection of another, without reſerving all its alliances, and all its ſubſiſting treaties. For the convention by which a ſtate puts itſelf under the protection of another ſovereign, is a treaty (§ 175.); if it does it freely, it ought to do it in ſuch a manner, as that the new treaty may be of no prejudice to thoſe that are antient. We have ſeen (§ 176.) what rights it receives from the care of its own preſervation, in caſe of neceſſity.

The alliances of a nation are not then deſtroyed, when it puts itſelf under the protection of another, unleſs they are incompatible with the conditions of that protection; its obligation ſubſiſts towards its antient allies, and theſe remain bound by ſuch obligation to it, while it has not put itſelf out of the ſtate of fulfilling its engagements towards them.

When neceſſity conſtrains a people to put themſelves under the protection of a foreign power, and to promiſe him the aſſiſtance of all their forces, for and againſt any other power, without accepting their allies; their antient alliances ſubſiſt, ſo far as they are not incompatible with the new treaty of protection. But if the caſe ſhould happen, that an antient ally enters into a war with the protector, the protected ſtate will be obliged to declare for this laſt, to which it is bound by ſtricter obligations, and by a treaty which derogates from all the others, in caſe they happen to claſh. Thus the Nepeſinians having been conſtrained to ſubmit to the Etrurians, thought themſelves afterwards obliged to adhere to their treaty of ſubmiſſion or capitulation, preferably to the alliance they had contracted with the Romans. *Poſtquam deditionis, quam ſocietatis, fides ſanctior erat,* ſays Livy [a].

[a] *Lib.* VI. *Cap.* X.

In

§ 205. Treaties diſſolved by common agreement.

In ſhort, as treaties are made by the comon conſent of the parties, they may alſo be diſſolved by a common agreement, and by the free conſent of the contracting powers; and though even a third ſhould find himſelf intereſted in the preſervation of the treaty, and would ſuffer by its being broken, if he has not entered into it, and nothing has been directly promiſed to him, thoſe who have reciprocally made promiſes that would turn to the advantages of this third, may alſo reciprocally diſcharge themſelves from them, without conſulting him, or without his having a right to oppoſe them. Two monarchs have reciprocally promiſed each other to join their forces for the defence of a neighbouring city: that city receives advantage from their ſuccours; but it has no right to it, and as ſoon as the two monarchs reſolve to diſpenſe with each others performance, it would be deprived of it, without having any cauſe to complain, ſince it had received no promiſe.

CHAP. XIV.

Of other public Conventions, of thoſe that are made by inferior Powers, in particular of the Agreement called in Latin Sponſio, *and of Conventions of Sovereigns with private Perſons.*

§ 206. Of conventions made by ſovereigns.

THE public pacts called conventions, articles of agreement, &c. when they are made between ſovereigns, differ from treaties only in their object (§ 153.). All we have ſaid of the validity of treaties, of their execution, of diſſolving them, and of the obligations and rights that flow from them, are applicable to the various conventions which ſovereigns may conclude with each other. Treaties, conventions, and agreements, are all public engagements, in regard to which there is but one, and the ſame right, and the ſame rules. We ſhall not here have recourſe to tedious repetitions. It would be equally uſeleſs to enter into an enumeration of the various kinds of theſe conventions which are always of the ſame nature, and differ only the matter that is the ſubject of them.

But

§ 207. Of those made by inferior powers.

But there are public conventions made by inferior powers, either in virtue of an expreſs mandate from the ſovereign, or by the power with which they are intruſted, by the terms of their commiſſion and according as they are allowed, or required by the nature of the affairs with which they are intruſted.

We call *inferior* or *ſubordinate powers*, public perſons, who exerciſe ſome part of the government, in the name, and under the authority of the ſovereign: ſuch are magiſtrates eſtabliſhed for the adminiſtration of juſtice, generals of armies, and miniſters of ſtate.

When theſe perſons form a convention by the expreſs order of the ſovereign, in a particular caſe, and are furniſhed with his power, the convention is made in the name of the ſovereign himſelf, who contracts by the mediation and miniſtry of his delegate or proxy: this is the caſe we have mentioned in § 156.

But public perſons, in virtue of their office, or the commiſſion given them, have alſo themſelves the power of making conventions on public affairs, exerciſing in this, the right and authority of the ſuperior power that has eſtabliſhed them. This power they receive two ways; it is either aſcribed to them in expreſs terms by the ſovereign, or it flows naturally from their commiſſion itſelf; the nature of the affairs with which theſe perſons are entruſted requiring that they ſhould have the power of making ſuch conventions, eſpecially in caſes where they cannot ſtay for the orders of the ſovereign. Thus the governor of a place, and the general who lays ſiege to it, have the power of agreeing about the capitulation; and every thing they thus conclude within the terms of their commiſſion, is obligatory to the ſtate or the ſovereign who has committed to them the power. Theſe ſort of conventions taking place principally in war, we ſhall treat of them more at large in Book III.

If

§ 208. Of treaties concluded by a public person, without orders from the sovereign, or without a sufficient power.

If a public person, an embassador, or general of an army, concludes a treaty, or a convention without orders from the sovereign, or without being authorized to do it by the power of his office, he goes beyond the bounds of his commission, and the treaty is null, as being made without a sufficient power (§ 157.): it cannot take place without the express or tacit ratification of the sovereign. The express ratification is an act by which the sovereign approves the treaty, and engages to observe it. The tacit ratification is taken from certain steps which the sovereign is justly presumed to take, only in virtue of the treaty, and which he could not take, if he did not consider it as concluded and agreed upon. Thus a peace being signed by the public ministers, who had even exceeded the orders of their sovereigns, if one of these causes troops to pass, on the footing of friends, through the territories of his reconciled enemy, he tacitly ratifies the treaty of peace. But if the ratification of the sovereign has been reserved, in order to be approved by an express ratification, it is necessary that it should be mediated in this manner to give the treaty all its force.

§ 209. Of the agreement called *sponsio*.

People call in Latin *sponsio*, an agreement relating to affairs of state, made by a public person, who goes beyond the terms of his commission, and acts without the orders or command of the sovereign. He who treats in this manner for the state, without having a commission, promises by this means to take such measures, that the state or the sovereign, shall approve and ratify the agreement; otherwise his agreement would be vain and illusive. The foundation of this agreement can be no other on either side, than the hope of the ratification.

The Roman history furnishes us with examples of this kind of agreements: let us stop at the most famous of them, at that of the Caudine Forks, which has been discussed by the most illustrious authors. The consuls T. Veturius Calvinus and Sp. Postumius, with the Roman army, being engaged in the defiles of the Caudine Forks without

without hope of escaping, concluded a shameful agreement with the Samnites; but informing them, that they could not make a true public treaty *(fœdus)* without orders from the Roman people, without the *feciales*, and the ceremonies consecrated by custom; the Samnite general contented himself with exacting a promise from the consuls and principal officers of the army, and with making them give six hundred hostages; and having made the Roman army lay down their arms, and caused them to pass under the yoke, sent them away. The senate however, refused to accept the treaty; delivered those who had concluded it to the Samnites, who refused to receive them, and then thought themselves free from all obligation, and covered from all reproach [c]. Authors have entertained very different sentiments of this conduct. Some assert, that if Rome was resolved not to ratify the treaty, she ought to have put things in the same situation they were before the agreement, by sending the intire army into the Caudine Forks; and this the Samnites maintained. I confess that I am not intirely satisfied with the reasonings I have found on this question, even in the authors whose superiority I fully acknowledge. Let us, however, endeavour, by taking advantage of their observations, to set the affair in a new light.

§ 210. The states not bound by a like agreement.

It presents two questions; first, to what those were bound who made the agreement *(sponsor)* if the state disowned it? Secondly, what obligation the state itself was under? But first it is necessary to observe, with Grotius [d], that the state was not bound by an agreement of that nature. This is manifest, even from the definition of the agreement called *sponsio*. The state had not given orders to conclude it, and had not conferred the power of doing it in any manner, either expressly, by command, or by full powers, or tacitly, by a natural or necessary consequence of the authority trusted to him who made the agreement *(sponsori)*. A general of the army might

[c] *Titus Livy, Lib.* IX.

[d] *De jure Belli & Pacis, Lib.* II. *Cap.* XV. § 16.

very

very well, in virtue of his commiſſion, make uſe of the power of forming particular conventions in the caſes that preſented themſelves, of pacts relative to himſelf, to his troops, or to the occurrences of the war; but not that of concluding a peace. He might bind himſelf, and the troops under his command, on all the occaſions where his functions required that he ſhould have the power of treating; but he could not bind the ſtate beyond the terms of his commiſſion.

§ 211. To what the promiſer is bound when it is diſowned.

Let us now ſee to what the perſon promiſing *(ſponſor)* is bound, when the ſtate diſowns the agreement. We ought not here to reaſon on what would take place in the law of nature between private perſons; the nature of things, and the conditions of the contracting powers, neceſſarily make a great difference between them. It is certain, that between individuals, he who merely and ſimply promiſes in the name of another, to do any thing without having his commiſſion, is obliged, if that other diſowns it, to accompliſh himſelf what he has promiſed to make an equivalent, or to reſtore things to their firſt ſtate, or in ſhort, fully to recompenſe him with whom he has treated, according to the various circumſtances of the caſe: his promiſe *(ſponſio)* can be no otherwiſe underſtood. But this is not the caſe with reſpect to a public perſon, who promiſes without orders, and without power for the performance of his ſovereign. It relates to things that infinitely ſurpaſs his power, and all his faculties; to things which he can neither execute himſelf, nor cauſe to be executed, and for which he can neither offer an equivalent, or a proportionable recompenſe; he is not even at liberty to give the enemy what he has promiſed, without being authoriſed to do it: in ſhort, it is no longer in his power to reſtore things intirely to their firſt ſtate. He who treats with him, can hope for nothing of this nature. If the promiſer deceives him, in ſaying, that he is ſufficiently authoriſed, he has a right to puniſh him. But if, as the Roman conſuls, at the Caudine Forks,

Forks, the promiſer acts with ſincerity, informing him, that he has not the power of binding the ſtate by a treaty; nothing elſe can be preſumed, but that the other party gladly runs the riſk of making a treaty that muſt become void, if it is not ratified; hoping that a regard for him who promiſed, and for the hoſtages, will induce the ſovereign to ratify what had been thus concluded. If the event deceives his hopes, he can only complain of his imprudence. An eager deſire of obtaining a peace on advantageous conditions, and the bait of ſome advantageous preſents, might alone induce him to make ſo hazardous an agreement. This was judiciouſly obſerved by the conſul Poſtumius himſelf, after his return to Rome. We may ſee the ſpeech which Titus Livy repreſents him making to the ſenate. "Your generals, ſaid he, and "thoſe of the enemy, have equally committed a miſtake. "We, in imprudently involving ourſelves in a bad ſitu- "ation; they in ſuffering to eſcape them, a victory "which the nature of the places gave them, ſtill diſ- "truſting their own advantages, and haſting, at any "price, to diſarm men always formidable while they had "arms in their hands. Why did not they keep us ſhut "up in our camp? Why did not they ſend to Rome, in "order to treat ſecurely of the peace, with the ſenate "and the people?"

It is manifeſt that the Samnites contented themſelves with the hope, that the engagement which the conſuls and principal officers had entered into, and the deſire of ſaving ſix hundred knights, left as hoſtages, would induce the Romans to ratify the agreement, conſidering, that let what would happen, they ſhould ſtill have theſe ſix hundred hoſtages, with the arms and baggage of the army, and the vain, or rather, as it proved by its conſequences, the fatal glory, of having made them paſs under the yoke.

Under what obligation then were the conſuls, and all who made theſe promiſes (*ſponſores*)? They themſelves judged

judged that they ought to be delivered up to the Samnites. This was not the natural conſequence of the agreement (*ſponſionis*); and according to the obſervation we have juſt made, it does not appear, that the promiſer having promiſed things which the acceptor well knew was not in his power, was obliged, on his promiſe being diſowned, to deliver himſelf up by way of recompenſe. But as he might expreſsly engage himſelf, this being within the terms of his power or commiſſion; the cuſtom of thoſe times had doubtleſs rendered this engagement a tacit clauſe of the agreement called *ſponſio*, ſince the Romans delivered up all the *ſponſores*; all thoſe who had promiſed; this was a maxim of their *fecial laws* [b].

If the *ſponſor* had not expreſsly engaged to deliver himſelf up, and if the received cuſtom did not impoſe it upon him as a law, all that he ſeems to have been obliged to do in conformity with his promiſe, was honeſtly to do whatever was lawful to engage the ſovereign to ratify what he had promiſed: and there is no doubt that, provided the treaty was ever ſo little equitable or advantageous to the ſtate, it would be ſupportable in conſideration of the misfortune from which he had preſerved it. To propoſe to ſpare the ſtate a conſiderable ſhock, by means of a treaty, and ſoon after to adviſe the ſovereign not to ratify it, not becauſe it is inſupportable, but becauſe an advantage might be taken of its having been done without power, muſt be a fraudulent proceeding, and a ſhameful abuſe of the faith of treaties. But what will the general do who, in order to ſave his army, has been forced to conclude a pernicious treaty, or one that reflects diſhonour upon the ſtate? Will he adviſe the ſovereign to ratify it? He will content himſelf with laying open the motives of his conduct, and the neceſſity that obliged

[b] I have ſaid in my preface, that the fecial law of the Romans was their law of war. The college of the feciales was conſulted on the cauſes that might authoriſe their undertaking a war, and on the queſtion it might give riſe to; it had alſo the care of the ceremonies on the declaration of war, and treaties of peace. They likewiſe conſulted the feciales, and made uſe of their miniſtry in all the public treaties.

him to treat; he will ſhew as Poſtumius did, that he alone is bound, and will deſire to be diſowned and delivered up for the public ſafety. If the enemy is deceived, it is through his own folly. Ought the general to have informed him, that according to all appearance his promiſes would not be ratified? This would be requiring too much. It is ſufficient, if he did not impoſe upon him by boaſting of more extenſive powers than he had, and that he confined himſelf to the taking advantage of his propoſals, without inducing him to treat by deceitful hopes. It is for the enemy to take all poſſible ſecurities: if he neglects them, why ſhould they not take advantage of his imprudence, as of one of the favours of fortune? "It "is ſhe, ſaid Poſtumius, who has ſaved our army, after "having put it in danger. The enemy's head was turned in his property, and his advantages have been no "more to him than a pleaſant dream."

If the Samnites had only required from the generals, and the Roman army, ſuch engagement as they had a power to enter into by the nature of their ſtate, and their commiſſion; if they had obliged them to ſurrender themſelves priſoners of war, or, not being able to keep them all, had diſmiſſed them upon their promiſe not to bear arms againſt them for ſome years, in caſe Rome ſhould refuſe to ratify the peace; the agreement would have been valid, as being made with ſufficient power, and the whole army would have been bound to obſerve it; for it is neceſſary that the troops, or their officers, ſhould have a power of entering into a contract on theſe occaſions, and upon this footing. This is the caſe of capitulations, of which we ſhall ſpeak in treating of war.

If the promiſer has made an equitable and honourable convention, on an affair, which from its very nature, he has the power to recompenſe him with whom he has treated, in caſe the convention is diſallowed, he is preſumed to have engaged to make that recompenſe, and this he ought to do, to diſcharge his promiſe, as did Fabius Maximus

Maximus in the example mentioned by Grotius [c]. But there are occaſions in which the ſovereign may forbid his doing it, and his giving any thing to the enemies of the ſtate.

§ 212. To what the ſovereign is bound.

We have ſhewn, that a ſtate cannot be bound by an agreement made without its order, and without its having granted any power for that purpoſe. But is it abſolutely under no obligation? This is what we are now to examine. If things are in their firſt ſituation, the ſtate or the ſovereign may diſown the treaty, which falls by this diſavowal, and is as if it had never been. But the ſovereign ought to manifeſt his reſolution as ſoon as the treaty comes to his knowledge; not indeed that his ſilence alone can give validity to a convention, that cannot have it without his approbation; but it would be unjuſt for him to give time to the other party to execute, on his ſide, an agreement which he would not ratify.

If he has already done any thing in virtue of the agreement; if the party, who has treated with the *ſponſor*, has on his ſide fulfilled his engagments, either in the whole, or in part, ought he to be recompenſed; or things to be reſtored to their firſt ſtate on diſowning the treaty; or will it be permitted to reap the fruits of it, at the ſame time that the ratification is refuſed? We ſhould here diſtinguiſh the nature of the things that have been executed, and that of the advantages that have accrued from them to the ſtate. He who having treated with a public perſon not furniſhed with ſufficient power, and executes the agreement on his ſide without ſtaying for its ratification, is guilty of an imprudence, and a very great fault, to which he has not been induced by the ſtate with which he thought he had contracted: But if he has given any thing, it cannot be retained, by taking advantage of his folly. When a ſtate believing that it has concluded a

[c] Lib. II. Chap. XV. § 16. Fabius Maximus having concluded an agreement with the enemy which the ſenate diſapproved, ſold a piece of land, for which he received two hundred thouſand ſeſterces, to free himſelf from his promiſe. It relates to the ranſom of the priſoners. *Aurel Victor. de Viris Illuſtr.* Plutarch's life of Fabius Maximus.

peace with the enemy's general, has, in conſequence of this, delivered up one of his ſtrong places, or given a ſum of money, the ſovereign of that general ought, doubtleſs, to reſtore what he has received, if he is unwilling to ratify the agreement. If he acts otherwiſe, he enriches himſelf with another's property, and detains that property without having any title to it.

But if the agreement has given nothing to the ſtate which it had not before: if, as in that of the Caudine Forks, all the advantage conſiſts in being drawn from danger, and preſerved from deſtruction, this is a fortunate advantage that may be improved without ſcruple. Who would refuſe to be ſaved by the folly of his enemies? And who would think himſelf obliged to indemnify that enemy, for the advantage he had ſuffered to eſcape him, when he had not fraudulently contributed to his loſs? The Samnites pretended, that if the Romans would not keep the treaty made by their conſuls, they ought to ſend back the army to the Caudine Forks, and reſtore every thing to its former ſtate: two tribunes of the people, who had been in the number of the *ſponſores*, in order to avoid being delivered up, dared to maintain the ſame opinion; and ſome authors have declared themſelves of their ſentiments. What, ſhall the Samnites take advantage of conjectures to give law to the Romans, to ſnatch from them a ſhameful treaty! They were guilty of imprudence in treating with the conſuls, who declared that they had not power to contract for the ſtate; and they ſuffered the Roman army to eſcape, after having covered them with infamy: ſhall not the Romans take advantage of the folly of an enemy, ſo void of generoſity? Should they either ratify a ſhameful treaty, or reſtore to that enemy advantages given them by the ſituation of places, and which they loſt merely by their own folly? Upon what principle can ſuch a deciſion be founded? had Rome promiſed any thing to the Samnites? had ſhe prevailed upon them to let her army go, and to wait for the

ratification

ratification of the agreement made by the conſuls? had ſhe received any thing in virtue of that agreement, ſhe would have been obliged to reſtore it, as we have already ſaid on declaring the treaty null, becauſe ſhe would have poſſeſſed it without a title. But ſhe had no ſhare in the action of her enemies, ſhe did not contribute to the great fault they had committed, and might as juſtly take advantage of it, as people in war do of all the miſtakes of an unſkilful general. Suppoſe that the conqueror, after having concluded a treaty with miniſters who have expreſsly reſerved the ratification to their maſter, ſhould have the imprudence to abandon all his conqueſts without waiting for the ratification, ought he to have the goodneſs to put him in poſſeſſion of them again, in caſe he did not chooſe to ratify the treaty?

I however confeſs, and freely acknowledge, that if the enemy had ſuffered an entire army to eſcape, on the faith of an agreement they had concluded with the general, unprovided with ſufficient power, and a ſimple *ſponſor*; I confeſs, I ſay, that if that enemy had behaved generouſly, if they had not made uſe of their advantages to dictate ſhameful or too ſevere conditions, equity would have required, either that the ſtate ſhould have ratified the agreement, or concluded a new treaty, on juſt and reaſonable conditions, giving up its pretenſions ſo far as the public welfare might allow. For we ought never to abuſe the generoſity and noble confidence even of an enemy. Puffendorf [d] thinks, that the treaty at the Caudine Forks contained nothing that was too ſevere or inſupportable. That author does not ſeem to make any great matter of that ſhame and ignominy that was caſt on the whole republic. He did not ſee the full extent of the Roman policy, which would never permit them, in their greateſt diſtreſſes, to accept a ſhameful treaty, or even to make peace as conquered: a ſublime policy to which Rome owed all her grandeur.

[d] *Jus Nat. & Gent. Lib.* VIII. *Cap.* IX. § 12.

Let

Let us at length remark, that the inferior power having, without orders, and without authority, concluded an equitable and honourable treaty, to deliver the ſtate from an imminent danger; the ſovereign who, on ſeeing himſelf thus delivered, ſhould refuſe to ratify the treaty, not becauſe he found it diſadvantageous, but only to ſave himſelf from doing what is the price of his deliverance, would certainly act againſt all the rules of honour and equity. This would be a caſe in which we might apply the maxim *ſummum jus, ſumma injuria.*

To the example we have drawn from the Roman hiſtory, let us add a famous one taken from modern hiſtory: The Swiſs, diſſatisfied with France, entered into an alliance with the emperor againſt Louis XII. and in the year 1513, made an irruption into Burgundy. They laid ſiege to Dijon. La Trimouille, who commanded in the place, fearing that he ſhould be unable to ſave it, treated with the Swiſs, and without waiting for a commiſſion from the king, concluded an agreement, in virtue of which the king of France was to renounce his pretenſions to the dutchy of Milan, and to pay the Swiſs, at certain times, the ſum of ſix hundred thouſand crowns; while the Swiſs, on their ſide, were only obliged to return home, and they were at liberty to attack France again, if they thought proper. They received hoſtages, and departed. The king was very much diſſatisfied with the treaty, though it had ſaved Dijon, and preſerved the kingdom, which was in very great danger, and he refuſed to ratify it [e]. It is certain, that La Trimouille had exceeded the power he received from his commiſſion, eſpecially in promiſing that the king ſhould renounce the dutchy of Milan. He probably only propoſed to get an enemy at a diſtance, that was more eaſily ſurpriſed into a negociation, than conquered by force of arms. Louis was not obliged to ratify and execute a treaty concluded

[e] *Guichardin, Book* XII. *Chap.* II. *De Watteville's Hiſt. of the Helvetic Confederacy, Part* II. 8. p. 185. and following.

without

without orders, and without powers; and if the Swiſs were deceived, they ought to blame their own imprudence. But as it manifeſtly appeared, that La Trimouille did not behave toward them with fidelity, ſince he had deceived them on the ſubject of the hoſtages, giving them in that quality, men of the meaneſt rank, inſtead of four of the moſt diſtinguiſhed citizens, whom he had promiſed [f]; the Swiſs had therefore juſt reaſon not to conclude a peace, at leaſt, as no recompenſe was made for this perfidy, either by delivering up him who was the author of it, or in any other manner.

§ 213. Of the private contracts of ſovereigns.

The promiſes, the conventions, all the private contracts of the ſovereign, are naturally ſubject to the ſame rules as thoſe of private perſons. If there ariſes any difficulty on this account, it is equally conformable to prudence, to the delicacy of ſentiment that ought to be particularly conſpicuous in a ſovereign, and to the love of juſtice, to cauſe them to be decided by the tribunals of the ſtate: this is the practice of all the ſtates that are civilized and governed by laws.

§ 214. Of thoſe made with private perſons in the name of the ſtate.

The conventions, and contracts, made by the ſovereign with private perſons who are foreigners in his quality of ſovereign, and in the name of the ſtate, follow the rules we have given in reſpect to public treaties. In fact, when a ſovereign enters into a contract, with men who neither depend on him, nor on the ſtate; whether it be with a private perſon, or with a nation, or ſovereign, this does not produce any difference in their right. If the private perſon who has treated with a ſovereign is his ſubject, the right is alſo much the ſame; but there is a difference in the manner of deciding the controverſies which may ariſe from the contract. This private perſon being a ſubject of the ſtate, is obliged to ſubmit his pretenſions to the eſtabliſhed courts of juſtice. Authors add, that the ſovereign may cancel theſe contracts, if he finds they are contrary to the public welfare. He may, doubt-

[f] See *De Watteville's Hiſt. of the Helvetic Confederacy*, p. 190.

leſs,

leſs, do it; but not from any reaſon taken from the particular nature of theſe contracts: this would be, either from the ſame reaſon that renders even a public treaty invalid, when it is fatal to the ſtate, and contrary to the public ſafety, or in virtue of the eminent domain which gives the ſovereign a right to diſpoſe of the property of the citizens, with a view to the common ſafety. We ſpeak here of an abſolute ſovereign. It appears in the conſtitution of this ſtate, who are the perſons, and what is the power that has a right to contract in the name of the ſtate, to exerciſe the ſupreme authority, and to declare what the public welfare demands.

§ 215. They oblige the nation and the ſucceſſors.

When a lawful power contracts in the name of the ſtates, it lays an obligation on the nation itſelf, and conſequently on all the future conductors of the ſociety. When therefore a prince has the power of concluding a treaty in the name of the ſtate, he lays an obligation on all his ſucceſſors, and theſe are not leſs bound than himſelf to fulfil his engagements.

§ 216. Of the debts of the ſovereign and the ſtate.

The conductor of the nation may have his private affairs, and his particular debts: theſe kind of debts he is obliged to pay out of his own private fortune. What he borrows for the ſervice of the ſtate, the debts contracted in the adminiſtration of public affairs, are contracts of ſtrict right, obligatory with reſpect to the ſtate and the whole nation. Nothing can diſpenſe with the diſcharging of theſe debts. As ſoon as they have been contracted by a lawful power, the right of the creditor is not to be ſhaken. Whether the money borrowed has turned to the advantage of the ſtate, or whether it has been diſſipated in fooliſh expences, is not the buſineſs of him who has lent it: he has truſted his wealth to the nation, and the nation ought to reſtore it to him again; it is ſo much the worſe for the ſtate, if it has committed its affairs into bad hands.

However, this maxim has its bounds, founded even on the nature of the thing. The ſovereign has not, in general, a power of making the body of the ſtate bound

for

for the debts he contracts, except they are for the welfare of the nation, and to enable him to provide for all occurrences. If he is abſolute, he alone is the judge in all doubtful caſes, what is required for the ſafety and welfare of the ſtate: but if, without neceſſity, he contracts immenſe debts, capable of ruining the nation for ever, there is no doubt that the ſovereign acts manifeſtly without a right, and thoſe who have aſſiſted him, have truſted their money very ill. Nobody can preſume to ſay, that a nation has ever been willing to ſubmit ſo far as to ſuffer itſelf to be abſolutely ruined by the caprice, and fooliſh diſſipations of its conductor.

As the debts of a nation can only be paid by contributions or taxes, the conductor or the ſovereign, who is not intruſted with the right of levying taxes or contributions or of raiſing ſupplies by his own authority, has not a right, by his borrowing, to involve the ſtate in debts. Thus the king of England, who has the right of making peace and war, has not that of contracting national debts, without the concurrence of parliament, becauſe he cannot, without their concurrence, raiſe any money on his people.

§ 217. Of the donations of the ſovereign.

It is not with the donations of the ſovereign as with his debts. When a ſovereign has borrowed, without neceſſity, or for a very unneceſſary uſe, the creditor has truſted his fortune with the ſtate, and it is juſt that the ſtate ſhould reſtore it to him, if the creditor can reaſonably preſume that he lent it to the ſtate. But when the ſovereign gives the wealth of the ſtate, ſome part of the domain, or a conſiderable fief, he has a right to do it only with a view to the public welfare, or on account of ſervices rendered to the ſtate, or for ſome other reaſonable cauſe, in which the nation is concerned: if he has given, without juſt reaſons, and without a lawful cauſe, he has given without power. The ſucceſſor, or the ſtate, may always revoke ſuch a donation; and by this, they would do no injury to the perſon to whom it was given,

given, ſince they take nothing from him which he had a right to poſſeſs. What we here ſay, is true of every ſovereign to whom the law does not expreſsly give the free and abſolute diſpoſal of the wealth of the ſtate: ſo dangerous a power is never founded on preſumption.

The immunities and privileges conferred by the mere liberality of the ſovereign, are a kind of donations, and may be revoked in the ſame manner, if they turn to the diſadvantage of the ſtate. But a ſovereign cannot revoke them by his mere authority, except he be abſolute, and even in this caſe, he ought to uſe his power ſoberly and with equal prudence and equity. Immunities granted on account of, or with a view to ſome return, have the nature of a burdenſome contract, and can only be revoked in caſe of abuſe, or when they become contrary to the ſafety of the ſtate. And if they are ſuppreſſed on this laſt account, thoſe who enjoyed them ought to be recompenſed.

CHAP. XV.

Of the Faith of Treaties.

§ 218. Of what is ſacred among nations.

THOUGH we have ſufficiently eſtabliſhed (§ 163. and 164.) the indiſpenſable neceſſity of keeping promiſes, and obſerving treaties, the ſubject is of ſuch importance, that we cannot omit conſidering it here in a more general view, as not intereſting to the contracting parties, but likewiſe to all nations, and the univerſal ſociety of mankind.

Every thing which the public ſafety renders inviolable, is ſacred in ſociety. Thus the perſon of the ſovereign is ſacred, becauſe the ſafety of the ſtate requires that he ſhould be in perfect ſecurity, and above the reach of all violence: thus the people of Rome declared the perſons of their tribunes ſacred, conſidering that it was eſſential to their ſafety that they ſhould ſecure their defenders from

from all attempts, and place them even above fear. Every thing therefore which for the common ſafety of the people, and for the tranquillity and ſecurity of the human race, ought to be inviolable, is held ſacred among nations.

§ 219. Treaties are ſacred between nations.

Who can doubt that treaties are in the number of thoſe things that are held ſacred by nations? They determine the moſt important affairs; they give rules to the pretenſions of ſovereigns; they ought to make known the rights of nations; and to ſecure their moſt precious intereſts. Among bodies politic, and ſovereigns who acknowledge no ſuperior on earth, treaties are the only means of adjuſting the various pretenſions of each, of reducing them to a rule of knowing on what to depend, and where to fix. But treaties are only vain words, if nations do not conſider them as reſpectable engagements, as inviolable rules to ſovereigns, and as ſacred throughout the whole earth.

§ 220. The faith of treaties is ſacred.

The faith of treaties, that firm and ſincere reſolution, that invariable conſtancy in fulfilling engagements, of which declaration is made in a treaty, is then holy and ſacred between the nations, whoſe ſafety and repoſe it ſecures: and if people would not be wanting to themſelves, infamy would ever be the ſhare of him who violates his faith.

§ 221. He who violates his treaties, violates the law of nations.

He who violates his treaties, violates at the ſame time the law of nations; for he deſpiſes the faith of treaties, that faith which the law of nations declares ſacred, and he does all in his power to render it vain. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and wounds the whole human race. "On the ob- "ſervation and execution of treaties, ſaid a reſpectable "ſovereign, depend all the ſecurity which princes and "ſtates have with reſpect to each other, and we can no "longer depend on the conventions to be made, if thoſe "that are made were not maintained [g]."

[g] Reſolution of the ſtates-general of the 15th of March 1726, in anſwer to the Memoir of the Marquis de St. Philip, Ambaſſador of Spain.

Thus

§ 222. The right of nations against him who despises the faith of treaties.

Thus all nations are interested to maintain the faith of treaties, to render them every where considered as sacred and inviolable; they have also a right to unite in order to humble him who shews that he despises them, who openly plays with them, who violates, and tramples them under his feet. This is a public enemy who saps the foundations of the repose of nations, and of their common safety. But we ought to take care not to extend this maxim to the prejudice of the liberty and independence that belong to all nations. When a sovereign breaks his treaties, or refuses to fulfil them; this does not immediately imply, that he considers them as vain names, and that he despises the faith of treaties: he may have good reasons for thinking himself discharged from his engagements, and other sovereigns have not a right to judge him. It is he who fails in his engagements, or pretensions that are manifestly frivolous, or who does not even give himself the trouble to alledge his pretences, to colour over his conduct, and to cover his bad faith: such a sovereign deserves to be treated as the enemy of the human race.

§ 223. The law of nations violated by the popes.

In treating of religion, in the first book of this work, we could not avoid giving several instances of the enormous abuses the popes have formerly introduced by their authority. There appeared one that was equally injurious to all states, and inconsistent with the law of nations. Several popes have undertaken to break the treaties of sovereigns; they have dared to unloose a contracting power from his engagements, and to absolve him from the oaths by which he has confirmed them. Cesarini, legate of pope Eugenius IV. resolving to break the treaty which Uladislaus king of Poland and Hungary had concluded with the Sultan Amurath, in the name of the Pope, declared the king absolved from his oaths [h]. In these times of ignorance, people thought themselves really

[h] History of Poland by the Chevalier de Solignac, Vol. IV. p. 112. He cites Dlugoss. Neugebauer, Sarnicki, Herburt. de Fulstin, &c.

bound

bound by nothing but by their oaths, and they attributed to the pope the power of abſolving them from all kind of oaths; Uladiſlaus took arms againſt the Turks; but that prince, in no other reſpects worthy of a better fate, paid dearly for his perfidy, or rather for his ſuperſtitious weakneſs: he periſhed, with his army, near Varna: a loſs fatal to Chriſtendom, and which was drawn on by its ſpiritual head. On Uladiſlaus was made this epitaph:

Romulidæ Cannas, ego Varnam clade notavi.
Diſcite, mortales, non temerare fidem.
Me niſi Pontifices juſſiſſent rumpere Fœdus
Non ferret Scythicum Pannonis ora jugum.

Pope John XII. declared null the oath mutually taken by the emperor Louis of Bavaria and his competitor Frederic of Auſtria, when the emperor ſet the other at liberty. Philip duke of Burgundy abandoning the alliance of the Engliſh, was abſolved from his oath by the pope at the council of Baſil. And at the ſame time, when the revival of letters, and the eſtabliſhment of the reformation ſhould have rendered the popes more circumſpect, the legate Caraffe, in order to oblige Henry II. king of France, to revive the war, dared, in 1556, to abſolve him from the oath he had made to obſerve the truce of Vaucelles[1]. The famous peace of Weſtphalia diſpleaſing the pope, on many accounts, he did not confine himſelf to proteſting againſt the articles of a treaty, in which all Europe was intereſted: he publiſhed a bull in which, *from his own certain knowledge, and full eccleſiaſtical power*, he declared ſeveral articles of the treaty *null, vain, invalid, iniquitous, unjuſt, condemned, reproved, frivolous, without force and effect, and that nobody was bound to obſerve them or any of them, though they were ſtrengthened by an oath.*—This was not all; he aſſumes the tone of an abſolute maſter, and proceeds thus:

[1] See the French and German Hiſtorians, on theſe facts.

thus: *And nevertheleſs, from a greater precaution, and at much as need be, from the ſame motions, knowledge, deliberations, and plenitude of power, we condemn, reprove, break, annul, and deprive of all force, and effect*, the ſaid articles, and all the other *things prejudicial to the above*, &c. [k]. Who does not ſee, that theſe enterpriſes of the popes, which were formerly very frequent, were violations of the law of nations, and directly tended to deſtroy all the bands that could unite mankind, and to ſap the foundations of their tranquillity, or to render the pope ſole arbiter of their affairs?

§ 224. This abuſe authoriſed by princes.

But who is not ſtruck with indignation at ſeeing this ſtrange abuſe authoriſed by princes themſelves? In the treaty concluded at Vincennes, between Charles V. king of France, and Robert Stuart king of Scotland, it was agreed, *that the popes ſhould free the Scots from all the oaths they had taken in ſwearing to a truce with the Engliſh, and that he ſhould promiſe never to diſcharge the French and Scots from the oaths they were going to make, in ſwearing to the new treaty* [l].

§ 225. The uſe of an oath in treaties. It does not conſtitute the obligation.

The cuſtom once generally received of ſwearing to the obſervation of treaties, had furniſhed the popes with a pretence for attributing to themſelves the power of breaking them, by abſolving the contracting powers from their oaths. Children themſelves now know that an oath does not conſtitute the obligation to keep a promiſe or a treaty: it gives only an additional ſtrength to that obligation, by calling God to bear witneſs. A ſenſible and an honeſt man, does not think himſelf leſs bound by his word alone, and by his faith given, than if he had added the ſanction of an oath. Cicero would not have people make much difference between one guilty of perjury and a liar. "The habit of lying, ſays that great man, makes per-

[k] Hiſtory of the treaty of Weſtphalia by Father Bougeant, in 12mo. Vol. VI. p. 413. and 414.

[l] Choiſy's Hiſtory of Charles V. p. 282. and 283.

"jury,

« jury eaſy. If we may prevail upon any one to break « his word, will it be very difficult to perſuade him to « be guilty of perjury? As ſoon as we once deviate from « the truth, the religion of an oath is no longer a ſuffi- « cient curb. What man will be bound by the invoca- « tion of the gods, if he pays no reſpect to his faith and « his conſcience? For this reaſon, the gods reſerve the « ſame puniſhment for the liar, and for him who is guil- « ty of perjury. For it muſt not be imagined, that « there is any virtue in the form of the oath, that irri- « tates the immortal gods againſt the perjured, it is ra- « ther on account of the perfidy and malice of him who « prepares a ſnare for the fidelity of others [m]."

The oath does not then produce a new obligation: it only ſtrengthens that impoſed by the treaty; and it in every thing follows the fate of that obligation: a real and ſuperabundant obligation while the treaty is in force, but becomes null with the treaty itſelf.

§ 226. It does not change the nature of obligations.

The oath is a perſonal act; it can therefore only regard the perſon of him who ſwears, whether he ſwears himſelf, or gives commiſſion to another to ſwear in his name. However, as this act does not produce a new obligation, it makes no change in the nature of the treaty. Thus an alliance ſworn to, is only ſworn to for him who made it; but if it be a real alliance, it ſubſiſts after him, and paſſes to his ſucceſſors, as an alliance not confirmed by an oath.

§ 227. It gives no pre-eminence to one treaty above another.

For the ſame reaſon, ſince the oath can impoſe no other obligation than that which reſults from the treaty itſelf, it gives no pre-eminence to one treaty, to the prejudice of thoſe that are not ſworn to. And as in the caſe where

[m] At quid intereſt inter perjurum & mendacem. Qui mentiri ſolet, pejerare conſuevit, quem ego ut mentiatur, inducere poſſum; ut pejeret; exorare facile potero nam qui ſemel à veritate deflexit, hic non majore religione ad perjurium, quam ad mendacium perduci conſuevit. Quis enim deprecatione Deorum, non conſcientiæ fide commonetur? Propterea quæ pœna ab Diis immortalibus perjuro, hæc eadem mendaci conſtituta eſt. Non enim ex pactione verborum quibus jusjurandum comprehenditur, ſed ex perfidia & malitia, per quam inſidiæ tenduntur alicui, Dii immortales hominibus iraſci & ſuccenſere conſuerunt. *Cicer. Orat. pro Q. Roſcio Comœdo.*

two

two treaties clash with each other, the more ancient ally ought to be preferred (§ 167.); the same rule should be observed, even when the last treaty has been confirmed by an oath. In the same manner, since it is not allowable to engage in treaties contrary to those that subsist (§. 165.); the oath will not justify such treaties nor give them an advantage over those that are contrary to them: this would be a commodious means by which princes might deliver themselves from their engagements.

§ 228. It cannot give force to a treaty that is invalid.

Thus also an oath cannot render a treaty valid that is not so, justify a treaty unjust in itself, nor lay an obligation to fulfil a treaty lawfully concluded, when a case is presented where its observations would be unlawful; as for instance, if the ally to whom succours has been promised, undertakes a war that is manifestly unjust. In short, every treaty made for a dishonest cause (§ 161.), every treaty prejudicial to the state (§ 160.), or contrary to the fundamental laws (Book I. § 265.) being null in its own nature, the oath that may have been added to such a treaty, is also null, and falls with the act it was intended to strengthen.

229. Of asseveration.

The asseverations used in entering into engagements are forms of expression appointed to give the greater force to promises. Thus kings promise in *the most sacred manner, with good faith, solemnly, irrevocably,* and engage their *royal word*, &c. An honest man thinks himself sufficiently bound by his word alone: yet these asseverations are not useless, they serve to shew, that princes engage with reflection, and the knowledge of what they are about; and thence they render their infidelity more shameful. Advantage should be taken of every thing among men whose fidelity is so uncertain; and since shame has a greater effect upon them than the sense of duty, it would be imprudent to neglect this method.

§ 230. The faith of treaties does not depend on the difference of religion.

After what we have said above (§ 162.) we may dispense with proving that the faith of treaties has no relation to the difference of religion, and cannot in any manner

manner depend upon it. The monſtrous maxim, that *we ought to keep no faith to heretics*, might formerly raiſe its head amidſt the madneſs of party, and the fury of ſuperſtition: but it is at preſent generally deteſted.

§ 231. Precaution taken in preparing treaties.

If the ſecurity of him who ſtipulates for any thing in his own favour, invites him to require preciſion, fullneſs, and the greateſt clearneſs in the expreſſions; good faith demands, on the other hand, that each make known his promiſes clearly, and without the leaſt ambiguity. It is barely ſporting with the faith of treaties, to endeavour to dreſs them up in vague or equivocal terms; to ſlide into them ambiguous expreſſions; to reſerve ſubjects of chicanery to ſurpriſe him with whom we treat, and to aſſault him with fineſſe and bad faith. Leave an able man in theſe arts to glory in his happy talents, and to eſteem himſelf a fine negociater; reaſon, and the ſacred law of nature, ſhew him to be as much beneath a vulgar cheat, as the majeſty of kings is raiſed above private perſons. True ability conſiſts in guarding againſt ſurpriſes; never in making uſe of them.

§ 232. Of ſubterfuges in treaties.

Subterfuges in a treaty are not leſs contrary to good faith. Ferdinand the Catholic King having concluded a treaty with the Archduke his ſon-in-law, thought to draw himſelf out of the affair by ſecret proteſtations againſt the ſame treaty. A puerile fineſſe! which, without giving any right to that prince, only manifeſted his weakneſs and bad faith.

§ 233. How far an interpretation manifeſtly falſe is contrary to the faith of treaties.

The rules that eſtabliſh a law interpretation of treaties, are of ſuch importance, as to deſerve to be the ſubject of a chapter. Let us here only obſerve, that a manifeſtly falſe interpretation is, in every reſpect that can be imagined, the moſt completely contrary to the faith of treaties: he who makes uſe of it, either imprudently ſports with that ſacred faith, or ſufficiently ſhews, that he is not ignorant how ſhameful it is to want it: he would act like a diſhoneſt man, and keep the reputation of a man of pro-

bity; he is an hypocrite who adds to his crime diſſimulation. Grotius relates ſeveral examples of an interpretation manifeſtly falſe (*a*): the Platæans having promiſed the Thebans to reſtore the priſoners, reſtored them after they had taken away their lives. Pericles having promiſed life to thoſe of the enemies who laid down their iron arms, cauſed thoſe to be killed whoſe cloaks were faſtened with iron claſps. A Roman general (*b*) having agreed with Antiochus to reſtore half of his veſſels, cauſed them all to be ſawed in two: all theſe interpretations are as fraudulent as that of Rhadamiſtus, who, according to Tacitus (*c*), having ſworn to Mithridates that he ſhould uſe againſt him neither fire nor poiſon, cauſed him to be ſmothered under a heap of clothes.

§ 234. Of tacit faith.

A prince may tacitly engage his faith as well as in expreſs terms; it is ſufficient that it be given in order to become obligatory, the manner can make no difference: tacit faith is founded on a tacit conſent, and a tacit conſent is that which is deduced by a juſt conſequence from the ſteps taken by any one. Thus all that is included, as Grotius ſays (*d*), in the nature of certain acts on which an agreement is made, is tacitly comprehended in the convention: or, in other words, every thing without which what is agreed upon cannot take place, is tacitly granted. If, for example, a promiſe is made to the army of an enemy that has advanced far into the country, that they ſhall be allowed to return home in ſafety, it is manifeſt that they cannot be refuſed proviſions, for they cannot return without them. In the ſame manner, in demanding or accepting an interview, full ſecurity is tacitly promiſed. Titus Livy juſtly ſays, that the Gallo-Greeks violated the law of nations in attacking the Conſul Manlius at the time

(*a*) *De Jure Belli & Pacis, Lib.* II. *Cap.* XVI. §. 5.

(*b*) Q. Fabius Labeo, as related by Valerius Maximus; Titus Livy takes no notice of this.

(*c*) *Annal. Lib.* XII.

(*d*) *Lib.* III. *Cap.* XXIV. §. 1.

when

when he repaired to the place of interview to which they had invited him (*a*). The emperor Valerius having been defeated by Sapor King of Perſia, ſent to him to demand a peace. Sapor declared, that he would treat with the enemy in perſon, and Valerius, without diſtruſt, going to the interview, was carried off by the perfidious enemy, who kept him a priſoner till his death, and treated him with the moſt brutal cruelty (*b*).

Grotius, in treating of tacit conventions, ſpeaks of thoſe in which perſons are bound by mute ſigns (*c*). We ought not to confound theſe two kinds. The conſent ſufficiently declared by a ſign, is as expreſs as if it had been ſignified by the voice. Words themſelves are no more than inſtituted ſigns. There are mute ſigns, which received cuſtom renders as clear and as expreſs words. Thus at preſent, in hanging out a white flag, a parley is demanded, as expreſsly as it could be done with the voice. The ſecurity of the enemy, who advances upon this invitation, is tacitly promiſed.

(*a*) Titus Livy, *Lib.* XXXVIII. *Cap.* XXV.
(*b*) The life of Valerian in Crevier's Hiſtory of the Emperors.
(*c*) *Lib.* III. *Cap.* XXIV. § 5.

CHAP. XVI.

Of Sureties given for the Obſervation of Treaties.

§ 235. Of guaranties.

UNHAPPY experience having too fully convinced mankind, that the faith of treaties, ſo holy and ſacred, is not always a ſufficient warrant for their obſervation; they have therefore ſought for ſecurities againſt perfidy, for methods, the efficacy of which did not depend on the good faith of the contracting powers. A *guaranty* is one of theſe means. When thoſe who have made a treaty of peace, or any other treaty, are not perfectly eaſy with reſpect to its obſervation, they ſeek for the guaranty of a powerful ſovereign. The *guarantee* promiſes to maintain the conditions of the treaty, and to cauſe it to be obſerved. As he may find himſelf obliged to make uſe of force againſt the contracting power who violates his promiſes, it is an engagement that no ſovereign ought to enter into lightly, and without good reaſon. Princes indeed ſeldom enter into it, but when they have an indirect intereſt in the obſervation of the treaty; or from particular connections of friendſhip. The guaranty may be promiſed equally to all the contracting parties, to ſome of them, or even to one alone: but it is commonly promiſed to all in general. It may alſo happen that ſeveral ſovereigns, entering into a common alliance, reciprocally render themſelves the guarantees of its obſervation, with reſpect to each other. The guaranty is a kind of treaty, by which aſſiſtance and ſuccours are promiſed to any one, in caſe he has need of them, in order to oblige another who is unfaithful to fulfil his engagements.

§ 236. Guarantees have no right to interfere unaſked in the execution of a treaty.

Guaranty being given in favour of the contracting powers, or of one of them, it does not authoriſe the guarantee to interfere in the execution of the treaty, or to preſs the obſervance of it, of himſelf, and without being required. If the parties by common agreement, judge proper to deviate

viate from the tenor of the treaty, to alter ſome of the articles, or to annul them intirely; if one would gladly have ſomething altered in favour of another, they have a right to do it, and the guarantee cannot oppoſe it. Obliged by his promiſe to maintain it, ſo far that none ſhall complain of its infraction, he has acquired no rights for himſelf. The treaty was not made for him; for if it was, he would not be merely a guarantee; but alſo a principal contracting party. This obſervation is of great importance, for care ſhould be taken, leſt under the pretence of being a guarantee, a powerful ſovereign ſhould make himſelf the arbiter of the affairs of his neighbours, and pretend to give them laws.

But it is true, that if the parties produce any change in the articles of the treaty, without the advice and concurrence of the guarantee, this laſt is no longer bound to adhere to the guaranty; for the treaty thus changed, is no longer that which he guarantied.

§ 237. The nature of the obligation it impoſes.

A nation not being obliged to do that for another which that other can do for itſelf, the guarantee is not naturally obliged to ſend ſuccours, except in the caſe where that nation to whom he has granted his guaranty, is not in a condition to procure juſtice for itſelf.

If there ariſes any diſpute between the contracting powers, about the ſenſe of any article of the treaty, the guarantee is not ſuddenly obliged to aſſiſt him in favour of whom he has given his guaranty. As he cannot engage to ſupport injuſtice, he is to examine, and to ſearch for the true ſenſe of the treaty, to weigh the pretenſions of him who reclaims his guaranty; and if he finds them ill founded, he may refuſe to ſupport them without failing in his engagements.

§ 238. The guaranty cannot be injurious to a third perſon.

It is not leſs evident, that the guaranty cannot be injurious to the rights of a third perſon. If it happens then that the treaty guarantied, is found to be contrary to the right of another perſon, this treaty being unjuſt in this point, the guarantee is no ways bound to procure the accompliſhment of it; for he can never, as we have ſhewn,

be

be obliged to ſupport injuſtice. This was the reaſon alledged by France, when ſhe declared for the houſe of Bavaria againſt the heireſs of Charles VI. though ſhe had guarantied the famous *pragmatic ſanction* of that Emperor. This reaſon is inconteſtably a good one, in the general view of it: it is neceſſary only to ſee whether the court of France made a juſt application of it. *Non noſtrum inter vos tantas componere lites.*

I ſhall obſerve on this occaſion, that according to common uſage, the term guaranty is often taken in a ſenſe a little different from that we have given to this word. Moſt of the powers of Europe guarantied the act by which Charles VI. had regulated the ſucceſſion to his dominions; the ſovereigns ſometimes reciprocally guaranty their reſpective ſtates: we rather call theſe treaties of alliance to maintain that law of the ſucceſſion, in order to ſupport the poſſeſſion of thoſe ſtates.

§ 239. Duration of the guaranty.

The guaranty naturally ſubſiſts as long as the treaty that is made the object of it; and in caſe of doubt this ought always to be preſumed, ſince it is ſought for, and given for the ſecurity of the treaty. But nothing can prevent its being confined to a certain time, to the lives of the contracting powers, to that of the guaratee, &c. In a word, we may apply a treaty of guaranty to all we have ſaid of treaties in general.

§ 240. Of treaties of ſecurity.

When it relates to things which another may do or give, as well as he who promiſes; as for inſtance, paying a ſum of money; it is ſafer to demand a *ſecurity* than a *guaranty*; for the *ſecurity* ought to accompliſh the promiſe in default of the principal party, while the guarantee is only obliged to do what depends on him, to render the promiſe fulfilled by him who made it.

§ 241. Of pawns, ſecurities, and mortgages.

A nation may put ſome of its poſſeſſions into the hands of another, for the ſecurity of its promiſes, debts or engagements. If it thus remits moveable things, it gives *pledges*. Poland has formerly pledged a crown and other jewels

jewels to the ſovereigns of Pruſſia. But towns and provinces are ſometimes given in pawn. If they are pledged only by an act which aſſigns them for the ſecurity of a debt, they ſerve as a *mortgage*: if they are put into the hands of a creditor, or of him with whom a prince has treated, they have the title of engagements or ſecurities: and if the revenues are ceded as an equivalent for the intereſt of the debt, it is the pact called *antichreſis*.

§ 242. Of the rights of a nation in what relates to a pledge.

All the right of him who holds a crown or province in pledge, is to ſecure what is due to him, or the promiſe that has been made him. He may then keep the town or the province in his hands, till he is ſatisfied; but he has not a right to make any change in it; for that town, or that country, does not belong to him as proprietor. He cannot even interfere in the government of it, beyond what is required for his ſecurity, unleſs the empire or the exerciſe of ſovereignty has been expreſsly made over to him. This laſt point is not naturally to be preſumed, ſince it is ſufficient for the ſecurity of the mortgage, that the country is put into his hands, and under his power. He is alſo obliged, like every other perſon who has received a pledge, to preſerve the country he holds for his ſecurity, and to prevent, as much as poſſible, its being laid waſte: he is anſwerable for this, and if the country happens to be ruined through his fault, he ought to indemnify the ſtate which committed it to his care. If the ſovereignty is committed to him, with the country itſelf, he ought to govern it according to its conſtitution, and preciſely in the ſame manner as the ſovereign of the country was obliged to govern it; for the latter could only pledge his lawful right.

§ 243. How he is obliged to reſtore it.

As ſoon as the debt is paid, or the treaty is accompliſhed, the ſecurity ends, and he who holds a town or a province by this title, ought to reſtore it faithfully, in the ſame ſtate in which he received it, ſo far as this depends on him.

Among thoſe who have no law but their avarice, or their ambition, who like Achilles, place all their right in the

the point of their ſword (*a*); the temptation is delicious: they have recourſe to a thouſand quibbles, a thouſand pretences, to retain an important place, or a country under their obedience. The ſubject is too odious for us to alledge examples: they are well enough known, and ſufficiently numerous to convince every ſenſible nation, that it is very imprudent to make over ſuch ſecurities.

§ 244. How it may be appropriated.

But if the debt be not paid at the fixed time, or if the treaty be not accompliſhed, that which has been given in ſecurity, may be detained and appropriated, or the mortgage ſeized, at leaſt, till the diſcharge of the debt, or a juſt recompenſe be made. The houſe of Savoy had mortgaged the country of Vaud to the two cantons of Bern and Fribourg. As it did not pay the mortgage, theſe two cantons took arms to make themſelves maſters of the country. The Duke of Savoy, inſtead of ſpeedily ſatisfying the debt, oppoſed them by force of arms, and gave them other ſubjects of complaint: the victorious cantons have therefore retained this fine country, as well for the payment of the debt as to defray the expences of the war, and to obtain a juſt indemnification.

§ 245. Of hoſtages.

In fine, a precaution of ſecurity which is very antient and much uſed among nations, is requiring hoſtages. Theſe are conſiderable perſons, whom the promiſing party delivers up to him to whom he binds himſelf, in order to keep them till the accompliſhment of what he has promiſed. This then is a contract relating to a pledge, in which free men are delivered up, inſtead of towns, countries, or jewels. We may therefore confine ourſelves, with reſpect to this contract, to making thoſe particular obſervations, which the difference of the things pledged renders neceſſary.

§ 246. What right a ſovereign has over hoſtages.

The ſovereign who receives the hoſtages, has no other right over them, than that of making ſure of their perſons, in order to detain them till the intire accompliſhment of the promiſes of which they are the pledge. He

(*a*) Jura negat ſibi nata, nil non arrogat armis. Horat.

may

may therefore take precaution to avoid their eſcaping from him; but theſe precautions ſhould be moderated by humanity, towards men whom he has no right to uſe ill, and they ought not to be extended beyond what prudence requires.

It is at preſent an amiable right, to behold the European nations content themſelves with the parole of the hoſtages. The Engliſh lords ſent to France in that quality, in purſuance of the treaty of Aix la Chapelle, in 1748, to ſtay till the reſtitution of Cape Breton, were ſolely bound by their word of honour, and lived at court, and at Paris, rather as miniſters of their nation, than as hoſtages.

§ 247. The liberty alone of hoſtages is given as a pledge.

The liberty alone of hoſtages is engaged, and if he who has given them breaks his promiſe, they may be kept in captivity. Formerly they were in ſuch caſes put to death: an inhuman cruelty, founded on an error. It was believed the ſovereign might arbitrarily diſpoſe of the lives of his ſubjects, or that every man was the maſter of his own life, and had a right to ſtake it as a pledge, when he delivered himſelf up as an hoſtage.

§ 248. When they ought to be ſent back.

As ſoon as the engagements are fulfilled, the cauſe for which hoſtages were delivered, no longer ſubſiſts, they are free, and ought to be reſtored without delay. They ought alſo to be reſtored, if the reaſon for which they were demanded, does not take place: to detain them then would be to abuſe the ſacred faith upon which they were delivered. The perfidious Chriſtiern II. King of Denmark, being obliged by contrary winds, to ſtop before Stockholm, and being, with his whole fleet, ready to periſh with hunger, made propoſals of peace: Steno, the adminiſtrator, imprudently truſting to his promiſes, furniſhed the Danes with proviſions, and even gave Guſtavus, and other lords, as hoſtages for the ſafety of the King, who pretended to have a deſire to come on ſhore: but the firſt fair wind, Chriſtiern weighed anchor, and carried off the hoſtages;

hoſtages; thus returning the generoſity of his enemy, by an infamous treachery (*a*).

§ 249. Whether they may be detained on any other account.

Hoſtages being delivered on the faith of treatie, and he who receives them, promiſing to reſtore them, as ſoon as the promiſe, of which they are the ſurety, ſhall be fulfilled, ſuch engagements ought to be literally accompliſhed: for it is neceſſary that the hoſtages ſhould be really and faithfully reſtored to their firſt ſtate, as ſoon as the accompliſhment of the promiſe has diſengaged them. It is not therefore permitted to detain them for any other cauſe. I am ſurpriſed to ſee that able men (*b*) teach the contrary. They build upon a ſovereign's right of ſeizing and detaining the ſubjects of another power in order to oblige him to do juſtice. The principle is true; but the application is not juſt. Theſe authors do not pay attention to this conſideration, that a hoſtage is put into the hands of that ſovereign, not without the faith of a treaty, in virtue of which he has been delivered, and is not expoſed to be ſo eaſily ſeized; and that the faith of ſuch a treaty does not ſuffer, that any other uſe ſhould be made of him who is appointed, nor that an advantage ſhould be taken beyond what has been expreſsly agreed. The hoſtage is delivered for the ſecurity of a promiſe, and for that only; as ſoon as the promiſe is fulfilled, the hoſtage, as we have juſt obſerved, ought to be reſtored to his firſt ſtate. To tell him they releaſe him as an hoſtage; but that they detain him as a pledge for the ſecurity of any other pretenſion, would be to take advantage of his ſtate of an hoſtage, contrary to the manifeſt ſpirit, and even in oppoſition to the very letter of the convention, according to which, as ſoon as the promiſe is accompliſhed, the hoſtage ought to be reſtored to himſelf and his country, and replaced in the ſtate from whence he was taken, as if he had never been an hoſtage. If ſovereigns did not ſtrictly adhere to this principle, there would be no longer any ſecu-

(*a*) Hiſtory of the Revolutions of Sweden.
(*b*) *Grotius, Lib.* III. *Cap.* XX. § 55. *Wolfius Jus Gent.* § 503.

rity

rity in giving of hoſtages; it would be eaſy for princes always to find ſome pretence for detaining them. Albert the Wiſe, Duke of Auſtria, making war in the year 1351, againſt the city of Zurich, the two parties referred the deciſion of their diſputes to arbitrators, and Zurich gave hoſtages. The arbitrators paſſed an unjuſt ſentence, dictated by partiality. In the mean time Zurich, after having made juſt complaints, reſolved to ſubmit to this deciſion: but the Duke formed new pretenſions, and detained the hoſtages (*a*) contrary to the faith of the arbitration, and in evident contempt of the law of nations.

§ 250. They may for their own actions.

But an hoſtage may be detained for his own actions, for crimes committed, or debts contracted in the country while he is an hoſtage there. This is doing no injury to the faith of the treaty. In order to be ſure of recovering his liberty according to the terms of the treaty, the hoſtage ought not to have the right of committing, with impunity, an outrage againſt the nation in which he is kept, and when he ſhould depart, it is juſt that he ſhould pay his debts.

§ 251. Of the ſupport of the hoſtages.

He who gives the hoſtages is to provide for their ſupport; for they are there by his order, and for his ſervice. He who receives them for his own ſecurity, ought not to be at the expence of their ſubſiſtence, but only of that of their guard, if he thinks proper to ſet a guard over them.

§ 252. A ſubject cannot refuſe being an hoſtage.

The ſovereign may diſpoſe of his ſubjects for the ſervice of the ſtate; he may therefore alſo give them in hoſtage, and he who is nominated ought to obey, as on every other occaſion, where he is commanded, for the ſervice of the country. But as the expences ought to be borne equally by the citizens, thoſe of the hoſtage ought to be defrayed at the public expence.

The ſubject alone may be given for an hoſtage in ſpite of himſelf. The vaſſal is not in this ſituation; for what he owes to the ſovereign is determined by the conditions

(*a*) Tſchudi, Vol. I. page 241.

of

of the fief; and he is bound to nothing more. Thus it is decided, that the vaſſal cannot be conſtrained to go as an hoſtage, if he is not at the ſame time a ſubject.

Whoever can make a treaty or a convention, may give and receive hoſtages. For this reaſon, not only the ſovereign has a right of giving them; but alſo inferior powers in the agreements they make, according to the power of their poſts, and the extent of their commiſſions. The governor of a town, and the general who lays ſiege to it, give and receive hoſtages for the ſecurity of the capitulation: whoever is under their command, ought to obey if he is nominated.

§ 253. Of the quality of hoſtages.

Hoſtages ought naturally to be conſiderable perſons, ſince they are required as a ſecurity. Mean perſons form but a weak aſſurance, at leaſt, if they are not in great numbers. Care is commonly taken to ſettle the quality of the hoſtages that are to be delivered, and it is a ſign of bad faith, to violate conventions in this reſpect. It was a ſhameful piece of perfidy in La Trimouille to give the Swiſs only four hoſtages from the dregs of the people, inſtead of four of the principal citizens of Dijon, as it was agreed in the famous treaty we have mentioned above (§ 212.). Sovereigns ſometimes give the principal perſons of the ſtate and princes themſelves in hoſtage. Francis I. gave his own ſons for the ſecurity of the treaty of Madrid.

§ 254. They ought not to fly.

The ſovereign who gives hoſtages, ought to give them with fidelity, as the pledges of his word, and conſequently, with the intention that they ſhould be kept till the entire accompliſhment of his promiſe. He cannot then approve of their flying; and if they do, ſo far from receiving them, he ought to ſend them back. The hoſtage on his ſide, anſwerably to the preſumed intention of his ſovereign, ought to remain faithfully with him to whom he is delivered, without endeavouring to eſcape. Clelia eſcaped out of the hands of Porſenna, to whom ſhe had

had been delivered as an hoſtage: but the Romans ſent her back, that they might not break the treaty (*a*).

§ 255. Whether the hoſtage who dies ought to be replaced.

If the hoſtage happens to die, he who has given him is not obliged to replace him, at leaſt, if this was not mentioned in the agreement. This was the ſecurity required of him: they loſt him without his being in fault, and no reaſon obliges him to give another.

§ 256. Of him who takes the place of an hoſtage.

If any one puts himſelf for ſome time in the place of an hoſtage, and this laſt happens to die a natural death, he who has taken the place of the hoſtage is free. For things ought to be put in the ſame ſtate they would have been in, if the hoſtage had not been permitted to abſent himſelf, and put another in his room: and for the ſame reaſon, the hoſtage is not free by the death of him who has taken his place only for a time. It would be quite the contrary, if the hoſtage had been exchanged for another: the firſt would be abſolutely free from all engagement, and he who had taken his place, would alone be bound.

§ 257. Of an hoſtage that obtains the crown.

A prince given in hoſtage, arriving at the crown, ought to be delivered up on furniſhing another good hoſtage, or ſo many as might altogether form an equivalent ſecurity for that furniſhed by himſelf, when he was delivered. This is manifeſt from the treaty itſelf, which does not declare that the king ſhall be an hoſtage. The king's perſon being in the hands of a foreign power, is a thing of too great conſequence, for it to be preſumed that the ſtate had reſolved to expoſe him to it. Fidelity ought to preſide in all conventions, and ſhould follow the manifeſt, or juſtly preſumed intention of the contracting powers. If Francis I. had died after having given his ſon as an hoſtage, certainly the Dauphin would have been releaſed: for he had been delivered only with a view of reſtoring the King to his kingdom; and if the Emperor had detained him, this view would have been fruſtrated, the King of

(*a*) Et Romani pignus pacis ex fœdere reſtituerunt. *Tit. Liv. Lib.* II. *Cap.* XIII.

France

France would ſtill have been a captive. I ſuppoſe, as is eaſily ſeen, that the treaty was not violated by the ſtate that gave the princes in hoſtage. In caſe that ſtate had broken its promiſe; advantage might reaſonably have been taken of ſuch an event, that rendered the hoſtage ſtill more precious, and his deliverance more neceſſary.

§ 258. The engagement of the hoſtage ends with the treaty.

The pledge of an hoſtage, as that of a city, or a country, ends with the treaty it was made to ſecure (§ 245.) And conſequently if the treaty is perſonal, the hoſtage is free at the moment when one of the contracting powers happens to die.

§ 259. The violation of the treaty does an injury to the hoſtages.

The ſovereign who breaks his word, after his having given hoſtages, does an injury not only to the other contracting power, but alſo to the hoſtages themſelves. For though ſubjects are fully obliged to obey their ſovereign who gives them in hoſtage, that ſovereign has not a right unjuſtly to ſacrifice their liberty, and without good reaſons to put their lives in danger. Delivered up as an aſſurance of their ſovereign's veracity, and not to ſuffer any harm; if he precipitates them into misfortunes, by violating his faith, he covers himſelf with double infamy. Pledges and engagements ſerve for a ſecurity for what is due; and their acquiſition recompenſes him for a breach of promiſe in the other. Hoſtages are rather pledges of the faith of him who gives them; it is ſuppoſed that he would be filled with horror at the thought of ſacrificing the innocent. But if particular conjunctures oblige a ſovereign to abandon the hoſtages; if, for example, he who has received them is the firſt who violates his engagement, the treaty can no longer be accompliſhed, without putting the ſtate in danger; nothing ought to be neglected to deliver theſe unfortunate hoſtages, and the ſtate cannot refuſe to recompenſe them for their ſufferings, and to reward them, either in their own perſons, or in their neareſt relations.

§ 260. The fate of the hoſtage when he who has given him fails in his engagements.

At the moment when the ſovereign, who has given the hoſtage, has violated his faith, the hoſtage loſes that quality, and becomes the priſoner of him who has received him. He has a right to detain him in perpetual captivity. But it is the buſineſs of a generous prince to improve his rights, ſo as to aſſuage the misfortunes of the innocent. And as the hoſtage is conſidered as nothing by his own ſovereign, who has abandoned him by his perfidy, he may devote himſelf to the prince who is the maſter of his deſtiny; who might acquire an uſeful ſubject, inſtead of a miſerable priſoner, the troubleſome object of his commiſeration. Or he might ſet him free, on ſettling with him the conditions.

§ 261. Of the right founded on cuſtom.

We have already obſerved, that the life of an hoſtage cannot be lawfully taken away on account of the perfidy of his maſter who has delivered him. The cuſtom of nations, the moſt conſtant practice, cannot juſtify an inſtance of barbarous cruelty, contrary to the law of nature. At a time even when this frightful cuſtom was but too much authorized, the Great Scipio loudly declared, that he would not ſuffer his vengeance to fall on innocent hoſtages; but on the perfidious themſelves, and that he knew how to puniſh none but enemies in arms (*a*). The Emperor Julian made the ſame declaration (*b*). All that ſuch a cuſtom can produce, is impunity among the nations who practiſe it. Whoever is guilty of it cannot complain that another is ſo too: but every nation may, and ought to declare, that it conſiders the action as a barbarity injurious to human nature.

(*a*) *Tit. Liv. Lib.* XXVIII. *Cap.* XXXIV.
(*b*) See *Grotius*, *Lib.* III. *Cap.* XI. § 18. *not.* 2.

CHAP.

CHAP. XVII.

Of the Interpretation of Treaties.

§ 262. That it is neceſſary to eſtabliſh rules of interpretation.

IF the ideas of men were always diſtinct, and perfectly determined, if in order to make them known, they had only proper terms, and none but ſuch expreſſions as were clear, preciſe, and ſuſceptible only of one ſenſe; there would never be any difficulty in diſcovering their meaning in the words by which they would expreſs it: nothing more would be neceſſary, than to underſtand the language. But yet the art of interpretation would not be uſeleſs. In conceſſions, conventions, and treaties, in all contracts as well as in the laws, it is impoſſible to foreſee and point out, all the particular caſes that may ariſe: we appoint, we ordain, we agree upon certain things, and expreſs them in a general view; and though the expreſſions of a treaty ſhould be perfectly clear, plain, and determinate, the true interpretation would ſtill conſiſt, in making, in all the particular caſes that preſent themſelves, a juſt application of what has been decreed in a general manner. But this is not all, conjunctures vary, and produce new kinds of caſes, that cannot be brought within the terms of the treaty, or the law; but by inductions drawn from the general views of the contracting powers, or of the legiſlature. Contradictions, and inconſiſtencies, either real or apparent, preſent themſelves with reſpect to different articles; and the queſtion is to reconcile them, and to ſhew the part that ought to be taken. But it is much worſe if we conſider that fraud ſeeks to take advantage even of the imperfection of language; that men deſignedly throw obſcurity and ambiguity into their treaties, to obtain a pretence for eluding them upon occaſion. It is then neceſſary to eſtabliſh rules founded on reaſon, and authorized by the law of nature, capable of diffuſing light over what is obſcure, of determining what is uncertain, and of fruſtrating the attempts

tempts of a contracting power void of good faith. Let us begin with thoſe that tend particularly to this laſt end; with thoſe maxims of juſtice and equity deſtined to repreſs fraud and prevent the effect of its artifices.

§ 263. 1. General maxim: it is not allowable to interpret what has no need of interpretation.

The firſt general maxim of interpretation is, that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and preciſe terms, when the ſenſe is manifeſt and leads to nothing abſurd, there can be no reaſon to refuſe the ſenſe which this treaty naturally preſents. To go elſewhere in ſearch of conjectures in order to reſtrain or extinguiſh it, is to endeavour to elude it. If this dangerous method be once admitted, there will be no act which it will not render uſeleſs. Let the brighteſt light ſhine on all the parts of the piece, let it be expreſſed in terms the moſt clear and determinate; all this ſhall be of no uſe, if it be allowed to ſearch for foreign reaſons in order to maintain what cannot be found in the ſenſe it naturally preſents.

§ 264. 2. General maxim: if he who can and ought to explain himſelf has not done it, it is to his own damage.

The cavillers, who diſpute the ſenſe of a clear and determinate article, are accuſtomed to draw their vain ſubterfuges from the pretended intention and views of the author of that article. It would be very often dangerous to enter with them into the diſcuſſion of theſe ſuppoſed views, that are not pointed out in the piece itſelf. This is a rule more proper to repel them, and which cut off all chicanery: *If he who can, and ought to have explained himſelf clearly and plainly, has not done it, it is the worſe for him: he cannot be allowed to introduce ſubſequent reſtrictions, which he has not expreſſed.* This is a maxim of the Roman law: *Pactionem obſcuram iis nocere, in quorum fuit poteſtate legem apertius conſcribere (a).* The equity of this rule is extremely viſible, and its neceſſity is not leſs evident. There can be no ſecure conventions, no firm and ſolid conceſ-

(a) *Digeſt. Lib.* II. *Tit.* XIV. *de Pactis Leg.* 39. See likewiſe *Digeſt. Lib.* XVIII. *Tit.* I. *de contrahenda emptione, Leg.* 21. Labeo ſcripſit obſcuritatem pacti nocere potius debere venditori, qui id dixerit, quam emptori; quia potuit re integra apertius dicere.

ſion, if theſe may be rendered vain by ſubſequent limitations that ought to have been mentioned in the piece, if they were included in the intentions of the contracting powers.

§ 265. 3. General maxim: neither of the contracting powers has a right to interpret the treaty at his pleaſure.

The third general maxim, or principle, on the ſubject of interpretation is: *That neither the one nor the other of the intereſted, or contracting powers, has a right to interpret the act, or treaty, at his pleaſure.* For if you are at liberty to give my promiſe whatſoever ſenſe you pleaſe, you will have the power of obliging me to do whatever you have a mind, contrary to my intention, and beyond my real engagement: and reciprocally, if I am allowed to explain my promiſes as I pleaſe, I may render them vain and illuſive, by giving them a ſenſe quite different from that in which they were preſented to you, and in which you muſt have taken them in accepting them.

§ 266. 4. General maxim: what ought to be taken for true which ſufficiently is declared.

On every occaſion where a perſon has, and ought to have ſhewn his intention, we take for true againſt him, what he has ſufficiently declared. This is an inconteſtible principle applied to treaties; for if they are not a vain play of words, the contracting parties ought to expreſs themſelves in them with truth, and according to their real intentions. If the intention ſufficiently declared, was not taken for the true intention of him who ſpeaks and binds himſelf, it would be of no uſe to contract, and form treaties.

§ 267. We ought to regulate ourſelves rather by the words of the perſon promiſing, than by thoſe of him who ſtipulates.

But it is here aſked, which of the contracting powers ought to have his expreſſions conſidered as moſt deciſive, with reſpect to the true ſenſe of the contract; whether we ſhould ſtop at thoſe of the power promiſing, rather than at thoſe of him who ſtipulates? The force and obligation of every contract, ariſing from a perfect promiſe, and he who promiſes being no farther engaged than his will is ſufficiently declared; it is very certain, that in order to know the true ſenſe of the contract, attention ought principally to be paid to the words of him who promiſes. For he voluntarily binds himſelf by his words, and we take

take for true againſt him, what he has ſufficiently declared. What appears to have given room to this queſtion is, the manner in which conventions are ſometimes made: the one offers the conditions, and the other accepts them: that is, the firſt propoſes what he requires, that the other ſhall oblige himſelf to perform; and the ſecond declares the obligations into which he really enters. If the words of him who accepts the conditions, relate to the words of him who offers them, it is certainly true, that we ought to regulate ourſelves according to the expreſſions of the latter; but this is becauſe the perſon promiſing, is conſidered as repeating them, in order to form his promiſe. The capitulations of places beſieged may here ſerve us for an example. The beſieged propoſes the conditions on which he is willing to ſurrender the place. The beſieger accepts them: the expreſſions of the firſt lay no obligation on the laſt, if it be not underſtood that he adopts them. He who accepts the conditions, is the true promiſer; and it is in his words that we ought to ſeek for the true ſenſe of the articles, whether he chuſes and forms them himſelf, or whether he adopts the expreſſions of the other party, by making uſe of them in his promiſe. But it is always to be remembered, that only that muſt be taken for true againſt him which he has ſufficiently declared. I am going to explain myſelf more particularly on this ſubject.

§ 268. 5. General maxim; the interpretation ought to be made according to certain rules.

It is a queſtion in the interpretation of a treaty, or of any other act whatſoever, to know what the contracting powers have agreed upon, in order to determine preciſely, on any particular occaſion, what has been promiſed and accepted; that is to ſay, not only what one of the parties has had the intention to promiſe; but alſo what the other has reaſonably and ſincerely thought to be promiſed; what has been ſufficiently declared to him, and upon which he muſt have regulated his acceptance. *The interpretation of every act, and of every treaty, ought then to be made according to certain rules proper to determine the ſenſe of them, ſuch as*

the parties concerned muſt naturally have underſtood, when the act was prepared and accepted. This is a fifth principle.

As theſe rules are founded on right reaſon, and are conſequently approved and preſcribed by the law of nature, every man, every ſovereign, is obliged to admit and to follow them. If princes were to acknowledge no rules that determined the ſenſe in which the expreſſions ought to be taken, treaties would be only empty words; nothing could be agreed upon with ſecurity, and it would be almoſt ridiculous to place any dependence on the effect of conventions.

§ 269. The faith of treaties lays an obligation to follow theſe rules.

But ſovereigns acknowledging no common judge, no ſuperior that can oblige them to receive an interpretation founded on juſt rules; the faith of treaties here forms all the ſecurity of the contracting powers. This faith is not leſs wounded by a refuſal to admit an evidently right interpretation, than by an open infraction. It is the ſame injuſtice, the ſame infidelity; and for one of them to involve himſelf in the ſubtleties of fraud, is not leſs odious.

§ 270. General rule of interpretation.

Let us now enter into the particular rules on which the interpretation ought to be formed, in order to be juſt and right. Since the lawful interpretation of a contract ought to tend only to the diſcovery of the thoughts of the author, or authors of that contract, as ſoon as we meet with any obſcurity we ſhould ſeek for what was probably in the thoughts of thoſe who drew it up, and to interpret it accordingly. This is the general rule of all interpretations. It particularly ſerves to fix the ſenſe of certain expreſſions, the ſignification of which is not ſufficiently determined. In virtue of this rule, we ſhould take theſe expreſſions in the moſt extenſive ſenſe, when it is probable, that he who ſpeaks, has had in his view every thing pointed out in this extenſive ſenſe; and on the contrary, we ought to confine the ſignification, if it appears that the author has bounded his thoughts by what is comprehended in the more

more limited ſenſe. Let us ſuppoſe that a huſband leaves his wife all his money. It is required to know, if this expreſſion means only his ready money, or whether it extends alſo to that which is placed out, and is due on bonds and other ſecurities. If the wife is poor, if ſhe was dear to her huſband, if there was found but little ready money, and the value of the other goods greatly ſurpaſſed that of the money both in ſpecie and in paper, the huſband, to all appearance, intended that ſhe ſhould poſſeſs all the money, due to him, as well as that in his coffers. On the contrary, if the woman is rich, if there be found large ſums of ready money, and if the value of what is found greatly exceeds the value of the other wealth, it appears that the huſband intended to leave his wife only his ready money.

We ought alſo, in conſequence of the ſame rule, to give to a diſpoſition, the full extent properly implied in the terms, if it appears that the author has had in his view every thing properly comprehended in them; but the ſignification ought to be reſtrained, when it is probable, that he who has made the diſpoſition, has not extended them to every thing which the propriety of the terms might include. As for inſtance, a father who has an only ſon, leaves the daughter of his friend all his jewels: he has a ſword enriched with diamonds, given him by a ſovereign prince; and there is certainly no appearance, that the teſtator ever thought of making this mark of honour paſs into a foreign family. This ſword, with the jewels with which it is adorned, ought then to be excepted from the legacy, and the ſignification of the terms to be reſtrained to his other jewels. But if the teſtator has neither ſon nor heir of his own name, and leaves his fortune to a ſtranger, there is no reaſon to limit the ſignification of the terms, they ſhould be taken in their full ſenſe, it being probable, that the teſtator has employed them in the ſame ſenſe.

The

§ 271. We ought to explain the terms conformably to common cuſtom.

The contracting powers are obliged to expreſs themſelves in ſuch a manner, as they may mutually underſtand each other. This is manifeſt from the nature even of the act. Thoſe who contracted, concurred in the ſame will, they agreed to deſire the ſame thing, and how could they agree upon it if they did not underſtand it perfectly? If this was not the caſe, their contract could be nothing but either ſport, or a ſnare. If then they ought to ſpeak in ſuch a manner as to be underſtood, it is neceſſary that they ſhould employ the words in their proper ſignification, in the ſenſe which cuſtom has given them, and that they ſhould affix to the terms they uſe, and to all their expreſſions, the received ſignification. They are not permitted to deviate with deſign, and without mentioning it, from the common uſe, and propriety of the expreſſion: and it is preſumed that they have conformed to it, while there are no preſſing reaſons to preſume the contrary; for the preſumption is in general, that things have been done as they ought. From all theſe inconteſtible truths, reſult this rule: *In the interpretation of treaties, pacts, and promiſes, we ought not to deviate from the common uſe of language, at leaſt, if we have not very ſtrong reaſons for it.* In all human affairs, when there is a want of certainty, we ought to follow probability. It is commonly very probable that they have ſpoken according to cuſtom; this always forms a very ſtrong preſumption, which cannot be ſurmounted but by a contrary preſumption, that is ſtill ſtronger. Camden (*a*) gives us a treaty in which it is expreſsly ſaid, that the treaty ſhall be preciſely underſtood, according to the force and meaning of the terms. After ſuch a clauſe, we cannot, under any pretence, deviate from the proper ſenſe cuſtom has affixed to the terms; the will of the contracting powers being there plain, and declared in the moſt determinate manner.

(*a*) Hiſtory of Queen Elizabeth.

The

§ 272. Of the interpretation of antient treaties.

The cuſtom of which we are ſpeaking is, that of the time in which the treaty, or the act in general, was concluded and drawn up. Languages vary inceſſantly, and the ſignification and force of words change with time. When an ancient act is to be interpreted, we ſhould then know the common uſe of the terms, at the time when it was written; and this is known by carefully comparing with each other, an act of the ſame date, and cotemporary writers. This is the only ſource by which we can truly arrive at this knowledge. The uſe of the vulgar languages being, as every one knows, very arbitrary, reſearches into the etymological and grammatical meaning of terms, in order to diſcover the true ſenſe, according to common cuſtom, would form only a vain theory, equally uſeleſs and deſtitute of proof.

§ 273. Of quibbles on words.

Words are only deſigned to expreſs the thoughts; thus the true ſignification of an expreſſion in common uſe, is the idea which cuſtom has affixed to that expreſſion. It is then a groſs quibble to affix a particular ſenſe to a word, in order to elude the true ſenſe of the intire expreſſion. Mahomet, Emperor of the Turks, at the taking of Negropont, having promiſed a man to ſpare his head, cauſed him to be cut in two through the middle of the body. Tamerlane, after having engaged the city of Sabaſta to capitulate under the promiſe of cauſing no blood to be ſpilt, cauſed all the ſoldiers of the garriſon to be buried alive (*a*): groſs ſubterfuges which, as Cicero (*b*) remarks, only ſerve to aggravate the crime of perfidy! *To ſpare the head of any one, and to ſpill no blood*, are expreſſions, according to common cuſtom, and eſpecially on ſuch an occaſion, which manifeſtly imply *giving life and ſafety*.

(*a*) See *Puffendorf's Law of Nature and Nations*, *Book* V. *Cap.* XII. § 3. *La Croix* in his *Hiſt.* of *Timurbec*, *Book* V. *Ch.* XV. ſpeaks of Timurbec's, or Tamerlane's cruelty towards 4000 Arminian knights; but ſays nothing of the perfidy which others attribute to him.

(*b*) Fraus enim adſtringit, non diſſolvit perjurium. *De Offic. Lib.* III. *Cap.* XXXII.

All

§ 274. A rule on this ſubject.

All theſe miſerable ſubtleties are overthrown by this unerring rule: when we manifeſtly ſee what is the ſenſe that agrees with the intention of the contracting powers, it is not permitted to turn their words to a contrary meaning. The intention ſufficiently known, furniſhes the true matter of the convention, of what is promiſed and accepted, demanded and granted. To violate the treaty is to go contrary to the intention ſufficiently manifeſted, rather than againſt the terms in which it is conceived; for the terms are nothing without the intention that ought to dictate them.

§ 275. Of mental reſervations.

It is neceſſary, in an enlightened age, to ſay that mental reſervations cannot be admitted in treaties? This is manifeſt, ſince by nature even of the treaty, the parties ought to declare the manner in which they would be reciprocally underſtood (§ 271.). There is ſcarcely a perſon at preſent who would not be aſhamed of building upon a mental reſervation. What can be the uſe of ſuch an artifice, if it was not to lull to ſleep ſome other perſon under the vain appearance of a contract? It is then a real piece of knavery.

§ 276. Of the interpretation of technical terms.

Technical terms, or terms proper to the arts and ſciences, ought commonly to be interpreted according to the definition given of them by the maſters of the art, the perſon verſed in the knowledge of the art or ſcience to which the term belongs. I ſay commonly; for this rule is not ſo abſolute, that we cannot, or even ought not to deviate from it, when we have good reaſon to do it; as for inſtance, if it was proved, that he who ſpeaks in a treaty, or in any other public piece, did not underſtand the art or ſcience from which he borrowed the term, that he knew not its force as a technical word; that he has employed it in a vulgar ſenſe, &c.

§ 277. Of terms whoſe ſignification admit of degrees.

If terms of art or others always relate to things that admit of different degrees, we ought not ſcrupulouſly to attach ourſelves to definitions; but rather to take the terms in a ſenſe agreeable to the diſcourſe of which they

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are a part. For a thing is regularly defined in its moſt perfect ſtate, and yet it is certain that we do not always underſtand it in that moſt perfect ſtate, whenever we ſpeak of it. Now the interpretation ſhould only tend to the diſcovery of the will of the contracting power (§ 268.); we ſhould then attribute to each term, the ſenſe which he who ſpeaks had probably in his mind. Thus when it is agreed in the treaty, to ſubmit to the deciſion of two or three able civilians, it would be ridiculous to endeavour to elude the compromiſe, under the pretence that we ſhould find no civilian accompliſhed in every point, to or ſtrain the terms ſo far as to reject all who did not equal Cujas, or Grotius. Would he who had ſtipulated for the aſſiſtance of ten thouſand good troops, have any reaſon to pretend, that the leaſt of theſe ſoldiers ſhould be incomparable to the veterans of Julius Cæſar? And if a prince had promiſed his ally a good general, muſt he ſend him none but a Marlborough or a Turenne?

§ 278. Of figurative expreſſions.

There are figurative expreſſions that are become ſo familiar in the common uſe of language, that they take place on a thouſand occaſions of the proper terms, ſo that we ought to take them in a figurative ſenſe, without paying any attention to their original, proper and more direct ſignification: the ſubject of the diſcourſe ſufficiently indicates the ſenſe that ſhould be given them. *To hatch a plot, to carry fire and ſword into a country* (*a*), are expreſſions of this ſort: there is ſcarcely any occaſion where it would not be abſurd to take them in their direct and literal ſenſe.

§ 279. Of equivocal expreſſions.

There is not perhaps any language that has not alſo words which ſignify two or many different things, or phraſes, ſuſceptible of more than one ſenſe. Thence ariſe miſtakes in diſcourſe. The contracting powers ought carefully to avoid them. To employ them with deſign in order to elude engagements, is a real perfidy, ſince

(*a*) Ourdir une trame, porter le fer & le feu dans un païs.

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the faith of treaties obliges the contracting parties to expreſs their intentions clearly (§ 271.). But if the equivocal term has found admiſſion into a public treaty, the interpretation is to make the uncertainty produced by it diſappear.

§ 280. The rule for theſe two caſes.

This is the rule that ought to direct the interpretation in this, as well as in the preceding caſe: *We ought always to give to expreſſions the ſenſe moſt ſuitable to the ſubject, or to the matter to which they relate.* For we endeavour by a true interpretation, to diſcover the thoughts of thoſe who ſpeak, or of the contracting powers in a treaty. Now it ought to be preſumed, that he who has employed a word capable of many different ſignifications, has taken it in that which agrees with the ſubject. In proportion as he employs himſelf on the matter in queſtion, the terms proper to expreſs his thoughts preſent themſelves to his mind; this equivocal word could then only ſuffer itſelf in the ſenſe proper to expreſs the thought of him who makes uſe of it, that is, in the ſenſe agreeable to the ſubject. It would be to no purpoſe to object, that we have ſometimes recourſe to equivocal expreſſions, with a view of exhibiting ſomething very different from what one has truly in the mind, and that then the ſenſe which agrees with the ſubject is not that which anſwers to the intention of the man who ſpeaks. We have already obſerved, that whenever a man can, and ought to have made known his intention, we may take for true againſt him what he has ſufficiently declared (§ 266.). And as good faith ought to precede in conventions, they are always interpreted on the ſuppoſition that it actually did preſide in them. Let us illuſtrate this rule by examples: the word *day*, is underſtood of the *natural day*, or of the time during which the ſun affords us its light, and the *civil day*, or of the ſpace of twenty-four hours. When it is uſed in a convention to point out a ſpace of time, the ſubject itſelf manifeſtly ſhews, that we meant the civil day, or the term

term of twenty-four hours. It was a miſerable artifice, or rather a notorious perfidy in Cleomenes, when having concluded a truce of ſome days with the people of Argos, and finding them aſleep on the third night, relying on the faith of the treaty, he killed a part, and made the reſt priſoners, alledging that the nights were not comprehended in the truce (*a*). The French word *fer* may be underſtood, either of iron, or of the weapons made of it, as the ſword. Therefore in a convention wherein it is declared, that *the enemy ſhall lay down their fer, or their ſwords*, it evidently ſignifies their arms: therefore Pericles, in the example related above (§ 233.), gave a fraudulent interpretation of his words, ſince it was contrary to what the nature of the ſubject manifeſtly pointed out. Q. Fabius Labeo was not a leſs diſhoneſt interpreter of his treaty with Antiochus; for a ſovereign agreeing, that he ſhall have half his fleet or his veſſels reſtored, undoubtedly means, that half the number of veſſels may be reſtored to him that he may make uſe of them, and not the half of each veſſel, when ſawed into two. Pericles and Fabius are alſo condemned by the rule eſtabliſhed above (§ 274), which forbids turning the ſenſe of the words contrary to the manifeſt intention of the contracting powers.

§ 281. There is no neceſſity of giving a term the ſame ſenſe in all the places in which it is uſed in a treaty.

If any one of thoſe expreſſions that have many different ſignifications, are found more than once in the ſame piece, we cannot make it a law, to take it every where in the ſame ſignification. For we muſt, conformably to the preceding rule, take this expreſſion in each article according as the ſubject requires, *pro ſubſtrata materia*, as the maſters of the art ſay. The word *day*, for inſtance, has two ſignifications, as we have juſt obſerved (§ 280.): if therefore it be ſaid in a convention, that there ſhall be a truce of fifty days, on conſideration that the commiſſaries on both ſides ſhall jointly endeavour, during eight days following each other,

(*a*) *Puffendorf, Lib. V. Cap. XII. § 7.*

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to adjuſt the diſpute: the fifty days of the truce are civil days of twenty-four hours; but it would be abſurd to underſtand them in the ſame ſenſe in the ſecond article, and to pretend that the commiſſaries ſhould labour eight days and nights without intermiſſion.

§ 282. We ought to reject every interpretation that leads to an abſurdity.

Every interpretation that leads to an abſurdity, ought to be rejected; or in other words, we ſhould not give to any piece a ſenſe from which follows any thing abſurd; but to interpret it in ſuch a manner as to avoid abſurdity. As it cannot be preſumed that any one deſires what is abſurd, it cannot be ſuppoſed, that he who ſpeaks has intended that his words ſhould be underſtood in a manner from which an abſurdity follows. Neither is it allowable to preſume, that he who ſports with a ſerious act; for what is ſhameful and unlawful is not to be preſumed. We call abſurd not only what is phyſically impoſſible; but what is morally ſo, that is, what is ſo contrary to reaſon, that it cannot be attributed to a man in his right ſenſes. Thoſe fanatic Jews who did not dare to defend themſelves, when the enemy attacked them on the ſabbath day, gave an abſurd interpretation of the fourth commandment. Why did they not alſo abſtain from dreſſing, walking, and eating? Theſe alſo are works, if the term is carried to its utmoſt rigour. It is ſaid, that a man in England married three wives, in order that he might not be ſubject to the penalty of the law, which forbids marrying two. This is doubtleſs a popular tale, made to caſt a ridicule on the extreme circumſpection of the Engliſh, who will not allow of departing from the letter in the application of the law. This wiſe and free people have too often ſeen, by the experience of other nations, that the laws are no longer a firm barrier, and ſecure defence, when once the executive power pretends to interpret them at pleaſure. But they doubtleſs do not pretend, that on any occaſion, the letter of the law ſhould be ſtrained to a ſenſe that is manifeſtly abſurd.

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The rule we have juſt mentioned is abſolutely neceſſary, and ought to be followed, even when there is neither obſcurity nor any thing equivocal in the diſcourſe, the text of the law, or the treaty itſelf. For it muſt be obſerved, that the uncertainty of the ſenſe that ought to be given to a law or a treaty, does not merely proceed from the obſcurity, or any other fault in the expreſſion; but alſo from the narrow limits of the human mind, which cannot foreſee all caſes and circumſtances, or include all the conſequences of what is appointed, or promiſed: and, in ſhort, from the impoſſibility of entering into this immenſe detail. We can only make laws or treaties in a general manner, and the interpretation ought to apply them to particular caſes, conformably to the intention of the legiſlature, or of the contracting powers. Now it cannot be preſumed, that in any caſe, they would lead to any thing abſurd: when therefore, if their expreſſions taken in their proper and ordinary ſenſe lead to it, it is neceſſary to turn them from that ſenſe, juſt ſo far as is ſufficient to avoid abſurdity. Let us ſuppoſe a captain has received orders to advance in a right line with his troops to a certain poſt: he finds a precipice in his way: he certainly is not ordered to precipitate himſelf down it, he ought therefore to turn from the right line, ſo far as is neceſſary to avoid the precipice; but no farther.

The application of the rule is more eaſy, when the expreſſions of the law, or of the treaty, are ſuſceptible of two different ſenſes: we then, without difficulty take that from which no abſurdity follows. In the ſame manner, when the expreſſion is ſuch, that we may give it a figurative ſenſe, we ought doubtleſs to do it, when it is neceſſary to avoid falling into an abſurdity.

§ 283. And that which renders the act null and without effect.

We do not preſume, that ſenſible perſons had nothing in view in treating together, or in forming any other ſerious agreement. *The interpretation which renders a treaty null and without effect, cannot* then *be admitted.* We may conſider

ſider this rule as a branch of the preceding; for it is a kind of abſurdity to ſuppoſe, that the terms of the treaty ſhould be reduced to ſay nothing. *It ought to be interpreted in ſuch a manner, as that it may have its effect, and not be found vain and illuſive.* And in this we proceed, as we have juſt obſerved in the foregoing ſection. In both caſes, as in all interpretations, it is neceſſary to give the words that ſenſe which ought to be preſumed moſt conformable to the intention of thoſe who ſpeak. If many different interpretations preſent themſelves, proper to avoid the nullity or abſurdity of the treaty, we ought to prefer that which appears moſt agreeable to the intention for which it was dictated: particular circumſtances, aſſiſted by other rules of interpretation, will ſerve to explain this. Thucydides relates (*a*), that the Athenians, after having promiſed to retire from the territories of the Bæotians, remained in the country under the pretence that the lands actually occupied by their army did not belong to the Bæotians. A ridiculous quibble, ſince in giving this ſenſe to the treaty, they reduced it to nothing, or rather to a puerile play. By the territories of the Bæotians ought manifeſtly to have been underſtood every thing comprehended in their antient limits, without excepting what the enemy had ſeized during the war.

§ 284. Obſcure expreſſions interpreted by others more clear in the ſame author.

If he who has expreſſed himſelf in an obſcure or equivocal manner, has ſpoken elſewhere more clearly on the ſame ſubject, he is the beſt interpreter of himſelf. *We ought to interpret his obſcure or vague expreſſions, in ſuch a manner, that they may agree with thoſe terms that are clear and without ambiguity, which he has uſed elſewhere, either in the ſame treaty, or in ſome other of the like kind.* In fact, while we have no proof that a man has changed his mind, or manner of thinking, it is preſumed that his thoughts have been the ſame on the ſame occaſions; ſo that if he has any where clearly ſhewn his intention, with reſpect to any thing, we

(*a*) *Lib.* IV. *Cap.* XCVIII.

ought

ought to give the ſame ſenſe to what he has elſewhere ſaid obſcurely on the ſame affair. Let us ſuppoſe, for inſtance, that two allies have reciprocally promiſed each other, in caſe of neceſſity, the aſſiſtance of ten thouſand foot, ſupported at the expence of him who ſent them, and that by a poſterior treaty, they agreed that the ſuccours ſhall be fifteen thouſand, without mentioning their ſupport: the obſcurity and uncertainty which remains in this article of the new treaty, is diſſipated by the clear and expreſs ſtipulation of the firſt, the allies not ſhewing that they have changed their minds, with reſpect to the ſupport of the auxiliary troops, it ought not to be preſumed, and theſe fifteen thouſand men ſhould be ſupported as the ten thouſand promiſed in the firſt treaty. The ſame holds good with much ſtronger reaſon, when it relates to two articles in one and the ſame treaty; when, for example, a prince promiſes to ſupport and pay ten thouſand men for the defence of the ſtates of his ally, and in another article, only four thouſand men, in caſe that ally is engaged in an offenſive war.

§ 285. Interpretation founded on the connection of the diſcourſe.

Frequently in order to abridge, people expreſs imperfectly, and with ſome obſcurity, what they ſuppoſe is ſufficiently elucidated by the things that preceded it, or even what they propoſe to explain afterwards; and beſides, the expreſſions have a force, and ſometimes even an entirely different ſignification, according to the occaſion, their connection, and their relation to other words. The connection and train of the diſcourſe is alſo another ſource of interpretation. *We ought to conſider the whole diſcourſe together, in order perfectly to conceive the ſenſe of it, and to give to each expreſſion, not ſo much the ſignification it may receive in itſelf, as that it ought to have from the thread and ſpirit of the diſcourſe.* This is the maxim of the Roman law, *Incivile eſt, niſi totâ lege perſpectâ unâ aliquâ particulâ ejus propoſitâ judicare, vel reſpondere* (*a*).

(*a*) *Digeſt. Lib.* I. *Tit.* III. *De Legibus, Leg.* 24.

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§ 286. Interpretation drawn from the connection and relation of the things themſelves.

The connection and relation of things themſelves, ſerve alſo to diſcover, and eſtabliſh the true ſenſe of a treaty, or of any other piece. *The interpretation ought to be made in ſuch a manner, that all the parts appear conſonant to each other, that what follows, agree with what went before; at leaſt, if it does not manifeſtly appear, that by the laſt clauſes, ſomething is changed that went before.* For it is preſumed, that the authors of the treaty have had an uniform and ſteady train of thought; that they did not deſire things which ill-agreed with each other, or contradictions; but rather that they have intended to explain one thing by another; and, in a word, that one and the ſame ſpirit reigns throughout the ſame work, or the ſame treaty. Let us render this more plain by an example. A treaty of alliance declares, that one of the allies being attacked, each of the others ſhall furniſh ſuccours of ten thouſand foot, paid and ſupported; and in another article, it is ſaid that the ally who is attacked ſhall be at liberty to demand ſuccours in cavalry, rather than in infantry. Here we ſee, that in the firſt articles, the allies have determined the number of the ſuccours, and its value, that of ten thouſand foot; and in the laſt article, they leave the nature of the ſuccours to the choice of him who ſhall want them, without their appearing to deſire any change in their value or number. If then the ally attacked demands cavalry, they will give him according to the known proportion, an equivalent of ten thouſand foot. But if it appears, that the end of the laſt article was to enlarge, in certain caſes, the ſuccours promiſed; for example, if it be ſaid, that one of the allies happened to be attacked by an enemy much more powerful than him, and ſtronger in cavalry, the ſuccours ſhall be furniſhed in cavalry, and not in infantry: it will then appear, that in this caſe, it ought to be ten thouſand horſe.

As two articles in one and the ſame treaty may relate to each other, two different treaties may do ſo too: and in this

this caſe, they are to be explained by one another. One is promiſed with a view to a certain thing that there ſhall be delivered ten thouſand ſacks of wheat. Afterwards it is agreed, that inſtead of wheat they ſhall give him oats. The quantity of oats is not expreſſed, but it is determined by comparing the ſecond convention with the firſt. If nothing ſhews that it is intended, by the ſecond agreement, to diminiſh the value of what ought to be delivered; it ſhould be underſtood a quantity of oats proportioned to the price of ten thouſand ſacks of wheat: if it manifeſtly appears, by the circumſtances and motives of the ſecond convention, that the intention was to reduce the value of what was due according to the firſt, the ten thouſand ſacks of wheat ſhould be changed to ten thouſand ſacks of oats.

§ 287. Interpretation founded on the reaſon of the act.

The reaſon of the law, or *the treaty*, that is, the motive which led to the making of it, and the view there propoſed, is one of the moſt certain means of eſtabliſhing the true ſenſe, and great attention ought to be paid to it, whenever it is required to explain an obſcure, equivocal, and undetermined point, either of a law or of a treaty, or to make an application of them to a particular caſe. *As ſoon as we certainly know the reaſon which alone has determined the will of him who ſpeaks, we ought to interpret his words, and to apply them in a manner ſuitable to that reaſon alone.* Otherwiſe he will be made to ſpeak and act contrary to his intention, and in a manner oppoſite to his views. In virtue of this rule a prince, who on granting his daughter in marriage has promiſed his future ſon-in-law ſuccours in all his wars, owes him nothing, if the marriage does not take place.

But we ought to be very certain, that we know the true and only reaſon of the law, the promiſe, on the treaty. It is not here permitted to deliver ourſelves up to vague and uncertain conjectures, and to ſuppoſe reaſon and views where there are none certainly known. If the

piece in queſtion is obſcure in itſelf; if in order to know the ſenſe, there are no other means left, but to ſearch for the reaſon of the act, and the views of the author; we muſt then have recourſe to conjecture, and in the want of certainty, receive for true, what is moſt probable. But it is a dangerous abuſe, to go, without neceſſity, in ſearch of reaſons and uncertain views, in order to turn, reſtrain, or deſtroy, the ſenſe of a piece that is clear enough in itſelf, and that preſents nothing abſurd; this is to offend againſt this inconteſtible maxim, that it is not permitted to interpret what has no need of interpretation (§. 263.). Much leſs is it permitted, when the author of a piece has himſelf there made known his reaſons and motives, to attribute to him ſome ſecret reaſon, as the foundation to interpret the piece contrary to the natural ſenſe of the terms. Though he had really the view attributed to him, if he has concealed it, and made known others, the interpretation can only be founded upon theſe, and not upon the views which the author has not expreſſed; we take for true againſt him what he has ſufficiently declared (§ 266.).

§ 288. Of the caſe where many reaſons concur to determine the will.

We ought to be ſo much the more circumſpect in this kind of interpretation, as frequently ſeveral motives concur to determine the will of him who ſpeaks in a law, or promiſe. It is poſſible that he was influenced only by the union of all theſe motives, or each taken a part might have been ſufficient to determine him: in the firſt caſe, *if we are very certain that the legiſlature, or the contracting powers, formed the law, or the contract, only in conſideration of many motives, and many reaſons taken together, the interpretation and application ought to be made in a manner agreeable to all theſe* united reaſons, and none of them ought to be neglected. But in the ſecond caſe, *when it is evident, that each of the reaſons that have concurred to determine the will, was ſufficient to produce that effect, ſo that the author of the piece would for each of theſe reaſons taken ſeparately, have done the ſame, as for all together,*

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his words ought to be interpreted and applied in ſuch a manner as they may agree with theſe reaſons ſeparately taken. Suppoſe a prince has promiſed certain advantages to all the proteſtants and foreign artiſts who will come and ſettle in his ſtates: if that prince is in no want of ſubjects, but only of artiſts; and if, on the other hand, it appears, that he would have no other ſubjects than proteſtants: his promiſe ought to be interpreted in a manner which relates only to the foreigners who unite theſe two characters of proteſtants and artiſts. But if it is evident, that this prince wants to people his country, and that though he would prefer proteſtant ſubjects to others, he has in particular ſo great a want of artiſts, that he would freely receive thoſe of any other religion; theſe words ſhould be taken in a disjunctive ſenſe, ſo that it will be ſufficient to be either a proteſtant, or an artiſt to enjoy the promiſed advantages.

§ 289. Of what makes a ſufficient reaſon for an act of the will.

To avoid running out into length and embarraſſment of expreſſion, we call a *ſufficient reaſon* an act of the will, that which has produced this act, or that which has determined the will on a particular occaſion; whether the will has been determined by a ſingle reaſon, or by many reaſons taken together. It is then ſometimes found, that this *ſufficient* reaſon conſiſts in the union of many different reaſons in ſuch a manner, that where one alone of theſe reaſons is wanting, the ſufficient reaſon no longer exiſts: and in the caſe where we ſay, that many motives, many reaſons, have concurred to determine the will, in ſuch a manner, however, that each in particular would have been alone capable of producing the ſame effect; there would then be many *ſufficient reaſons* for producing one ſingle act of the will. This is ſeen every day: a prince, for inſtance, declares war for three or four injuries received, each of which would have been ſufficient to have produced the declaration of war.

§ 290. The extenſive interpretation taken from the reaſon of the act.

The conſideration of the reaſon of a law, or promiſe, does not only ſerve to explain the obſcure or equivocal terms of the piece; but alſo to extend or confine the diſpoſitions independently of the terms, and to conform to the intention and views of the legiſlature or the contracting powers, rather than to their words. For according to the remark of Cicero (*a*) the language invented to explain the will, ought not to hinder its effect. *When the ſufficient, and only reaſon of a diſpoſition*, either of a law or a promiſe *is very certain and well known, we underſtand this diſpoſition in the caſe where the ſame reaſon is applicable, though it is not comprehended within the ſignification of the terms.* This is what is called *the extenſive interpretation.* It is commonly ſaid, *that we ought to apply rather to the ſpirit than to the letter.* Thus the Mahometans juſtly extend the prohibition of wine in the Alcoran to all intoxicating liquors; that dangerous quality being the only reaſon that could induce their legiſlator to prohibit the uſe of wine. Thus alſo, if at the time when there were no other fortifications but walls, it was agreed not to encloſe a certain place with walls, it would not be allowed to defend it with foſſes and ramparts; the only view of the treaty being manifeſtly to hinder its being made a ſtrong place.

But we ſhould here obſerve the ſame precaution we have lately mentioned (§. 287.), and even a ſtill greater; ſince it relates to an application not authorized in any manner by the terms of the act. We ought to be very certain, that we know the true and only reaſon of the law or of the promiſe, and that the author has taken it in that extent he ought to have done, in order to comprehend the caſe to which we would extend that law, or that promiſe. As to the reſt, I do not here forget what I have ſaid above

(*a*) Quid? verbis ſatis hoc cautum erat? Minime. Quæ res igitur valuit? Voluntas: quæ ſi, tacitis nobis, intelligi poſſet, verbis omnino non uteremur. Quia non poteſt, verba reperta ſunt, non quæ impedirent, ſed quæ indicarent voluntatem. *Cicer. Orat. pro Cecina.*

(§ 268.),

(§ 268.), that the true ſenſe of a promiſe is not only what the perſon promiſing had in his mind; but alſo that which has been ſufficiently declared, that which the two contracting powers muſt reaſonably have underſtood. The true reaſon of a promiſe, is alſo that which the contract, the nature of things, and other circumſtances, make ſufficiently known: it would be uſeleſs and ridiculous to alledge ſome ſide-view, which the perſon had ſecretly in his mind.

§ 291. Of fraudstending to elude the laws or promiſes.

The rule juſt given, alſo ſerves to deſtroy the pretences and miſerable evaſions of thoſe who ſeek to elude the laws, or the treaties. Good faith affixes itſelf to the intention, fraud inſiſts on the terms, when it thinks it can conceal itſelf under them. The iſle of Pharos near Alexandria was, with other iſlands, tributary to the Rhodians. The latter having ſent men to collect the taxes, the Queen of Egypt amuſed them for ſome time at her court, making haſte to join Pharos by Moles to the continent; after which ſhe laughed at the Rhodians, and ordered them to be told, that it was with a very ill grace, they could pretend to raiſe the taxes on the main land, and that they could only require them from the iſlands (*a*). A law forbad the Corinthians giving veſſels to the Athenians; and they ſold them at five drachmas for each veſſel (*b*). The following was an expedient worthy of Tiberius, cuſtom not permitting him to cauſe a virgin to be ſtrangled, he ordered the hangman firſt to deflower the young daughter of Sejanus, and then to ſtrangle her (*c*). To violate the ſpirit of the law, by pretending to reſpect the letter, is a fraud no leſs criminal than an open violation of it; it is not leſs contrary to the intention of the legiſlature, and only ſhews a more artful and more deliberate malice.

(*a*) *Puffendorf, Lib.* V. *Cap.* XII. §. 18. He cites Amn. Marcell. *Lib.* XXII. *Cap.* XVI.
(*b*) *Puffend. ibid. Herodote Erato.*
(*c*) *Tacit. Annal. Lib.* V. 9.

The

§ 292. Of the reſtrictive interpretation.

The reſtrictive interpretation, oppoſed to *the extenſive interpretation*, is founded on the ſame principle. As we extend a diſpoſition to the caſes, which without being comprehended in the ſignification of the terms, are comprehended in the intention of that diſpoſition, and included in the reaſons that produced it: ſo, in like manner, we limit a law or a promiſe, contrary to the literal ſignification of the terms, by regulating our judgment, by the reaſon of that law or that promiſe: that is, *if a caſe be preſented, in which one cannot abſolutely apply the well-known reaſon of a law or a promiſe, this caſe ought to be excepted, though, on conſidering the ſignification of the terms, it appears to fall under the diſpoſition of the law or the promiſe.* It is impoſſible to think of every thing, to foreſee every thing, and to expreſs every thing; it is ſufficient to declare certain things in ſuch a manner, as to make our thoughts known in relation to the things of which we do not ſpeak; and as Seneca the rhetorician ſays (*d*), there are exceptions ſo clear, that it is unneceſſary to expreſs them. The law condemns to ſuffer death whoever ſtrikes his father: ſhall we puniſh him who has ſhaken and given a blow to his father, to recover him from a fainting fit? ſhall we puniſh a little infant, or a man in a delirium, who has liſted up his hand againſt the author of his life? In the firſt caſe the reaſon of the law is intirely wanting, and it is not applicable to the two others. We ought to reſtore what is intruſted to us: ſhall I reſtore what the robber has intruſted to me, at the time when the true proprietor makes himſelf known to me, and demands his ſubſtance? A man has left his ſword with me: ſhall I reſtore it to him, when in a tranſport of fury he demands it, in order to kill an innocent perſon?

§ 293. Its uſe, in order to avoid falling into abſurdities, or into what is unlawful.

We uſe the reſtrictive interpretation to avoid falling into an abſurdity (ſee §. 282.). A man bequeaths his houſe to one; and to another his garden, the only entrance into which is through the houſe. It would be ab-

(*d*) *Lib.* IV. *Declam.* XXVII.

ſurd

ſurd to ſuppoſe, that he had left the latter a garden into which he could not enter: we muſt then reſtrain the donation of the houſe, and underſtand, that it was given only upon the condition of allowing a paſſage to the garden. The ſame method of interpretation takes place, when a caſe is preſented, in which the law or the treaty, according to the rigour of the terms, lead to ſomething unlawful. This exception muſt then be made, ſince nobody can promiſe or ordain what is unlawful. For this reaſon, though aſſiſtance has been promiſed to an ally, in all his wars, no aſſiſtance ought to be given him when he undertakes one that is manifeſtly unjuſt.

§ 294. Or in that which is too ſevere and burdenſome.

When a caſe ariſes in which it would be too prejudicial to any one to take a law or a promiſe according to the rigour of the terms, a reſtrictive interpretation is alſo then uſed, and we except the caſe, agreeably to the intention of the legiſlature, or of him who made the promiſe. For the legiſlature requires only what is juſt and equitable, and in contracts no one can engage in favour of another in ſuch a manner as to be eſſentially wanting to himſelf. It is then preſumed with reaſon, that neither the legiſlature nor the contracting powers have intended to extend their regulation to caſes of this nature, and that they themſelves would have excepted them, had theſe caſes preſented themſelves. A prince is no longer obliged to ſend ſuccours to his ally, when he himſelf is attacked, and has need of all his forces for his own defence. He may alſo, without any perfidy, abandon an alliance when the ill-ſucceſs of the war has rendered his ſtate on the brink of ruin, and made it neceſſary for him to treat with the enemy. Thus towards the end of the laſt century, Victor Amedeus, Duke of Savoy, found himſelf under the neceſſity of ſeparating from his allies, and of receiving law from France, to avoid loſing his eſtates. The King his ſon had, in 1745, good reaſons, to juſtify a ſeparate peace: but his courage, and juſt views of his true intereſt, made him

him take the generous reſolution to ſtruggle againſt an extremity, which might have diſpenſed with his perſiſting in his engagements.

§ 295. How it ought to reſtrain the ſignification agreeably to the ſubject.

We have ſaid above (§ 280.), that we ſhould take the expreſſions in the ſenſe that agrees with the ſubject or the matter. The reſtrictive interpretation is alſo directed by this rule. *If the ſubject or the matter treated of will not allow that the terms of a diſpoſition ſhould be taken in their full extent, we ſhould limit the ſenſe according as the ſubject requires.* Let us ſuppoſe, that in a country, cuſtom does not render fiefs hereditary in the line of conſanguinity, properly ſo called, but only in the male line; if an act of infiefment in that country declares, that the fief is given to a perſon for him and his male deſcendants; the ſenſe of theſe laſt words ought to be reſtrained to the males deſcending from the males; for the ſubject will not admit of our underſtanding them alſo of the males who are the iſſue of the females, though they are in the number of the male deſcendants of the firſt poſſeſſor.

§ 296. How a change happening in the ſtate of things may form an exception.

The following queſtion has been propoſed and debated: if promiſes include in themſelves this tacit condition, that things ſhall remain in the ſtate they are in; can a change happening in the ſtate of things make an exception to the promiſe and render it void? The principle drawn from the reaſon of the promiſe, ought to ſolve the queſtion. *If it be certain and manifeſt, that the conſideration of the preſent ſtate of things was one of the reaſons which occaſioned the promiſe: that the promiſe has been made in conſideration, or in conſequence of that ſtate of things; it depends on the preſervation of things in the ſame ſtate.* This is evident, ſince the promiſe was made only upon this ſuppoſition. When therefore the ſtate of the things eſſential to the promiſe, and without which it certainly would not have been made, happen to become changed, the promiſe falls with its foundation: and in the particular caſes where things ceaſe for a time to be in the

the ſtate that has produced the promiſe, or concurred to produce it, an exception ought there to be made. An elective prince being without children, promiſes an ally to take ſuch meaſures as he ſhall be appointed his ſucceſſor. He has a ſon born: who can doubt that the promiſe is not made void by this event? He who in a time of peace promiſes ſuccours to an ally, owes him none when he has need of all his forces, for the defence of his own dominions. The allies of a prince but little formidable, who have promiſed him a faithful and conſtant aſſiſtance, in order to increaſe his power, that he may obtain a neighbouring ſtate by election or by marriage, will have a juſt foundation to refuſe him aſſiſtance, and even to enter into an alliance againſt him, when they ſee him arrive to ſuch an height of power, as to threaten the liberties of Europe. If the Great Guſtavus had not been killed at Lutzen, Cardinal de Richelieu, who had concluded an alliance for his maſter with that prince, whom he had drawn into Germany, and aſſiſted with money, would perhaps have been obliged to traverſe the deſigns of that conqueror, when become formidable; to ſet bounds to his aſtoniſhing progreſs, and to ſupport his humbled enemies. The ſtates-general of the United Provinces in 1668, conducted themſelves on theſe principles. They formed a triple alliance in favour of Spain, before their mortal enemy, againſt Louis XIV. their antient ally. It was neceſſary to oppoſe banks to a power which threatened to overflow all before it.

But we ought to be very reſerved in the uſe of the preſent rule; it would be a ſhameful abuſe to take advantage of every change that ariſes in the ſtate of things to become diſengaged from a promiſe: there are none of them upon which we can lay a foundation. The only ſtate of things, on account of which the promiſe is made, is eſſential to it, and the change of that ſtate alone can lawfully hinder or ſuſpend the effect of that promiſe. This is the ſenſe which

which ought to be given to that maxim of the civilians, *Conventio omnis intelligitur rebus ſic ſtantibus.*

What we ſay of promiſes ought alſo to extend to the laws. The law which relates to a certain ſtate of things can only take place in that ſtate. We ought to reaſon in the ſame manner with reſpect to a commiſſion. Thus Titus being ſent by his father to pay his reſpects to the Emperor, turned back on being informed of the death of Galba.

§ 297. The interpretation of an act in unforeſeen caſes.

In unforeſeen caſes, that is, when the ſtate of things are found ſuch as the author of the diſpoſition has not foreſeen, and could not have thought of, *we ſhould rather follow his intention, than his words, and interpret the act as he himſelf would have interpreted it, had he been preſent, or conformably to what he would have done if he had foreſeen the things that happened.* This rule is of great uſe to judges, and to all thoſe in ſociety who are appointed to put in force the bequeſts of citizens. A father appoints by will a tutor for his children, who are under age. After his death the magiſtrate finds that the tutor he has nominated is an extravagant profligate, without ſubſtance or conduct: he therefore diſmiſſes him, and eſtabliſhes another according to the Roman laws (*a*); adhering to the intention of the teſtator, and not to his words; for it is very reaſonable to think, and it ought to be preſumed, that the father never intended to give his children a tutor who would ruin them, and that he would have nominated another, had he known the vices of this.

§ 298. Of the reaſon taken from the poſſibility, and not the exiſtence of a thing.

When things which enter into the reaſon of a law or convention, are conſidered, not as actually exiſting, but only as poſſible; or in other words, *when the fear of an event is the reaſon of a law or a promiſe, we can only except thoſe caſes where it is ſhewn that the event is really impoſſible.* The bare poſſibility of the event, is ſufficient to hinder all exceptions; if for

(*a*) *Digeſt. Lib.* XXVI. *Tit.* III. *De Confirm. Tutor. Leg.* 10.

inſtance,

inſtance, a treaty declares that an army or a fleet ſhall not be conducted to a certain place, it ſhall not be permitted to conduct thither an army or a fleet, under the pretence that it is done without any deſign of injury. For the end of a clauſe of this nature, is not only to prevent a real evil; but alſo to keep all danger at a diſtance, and to avoid even the leaſt ſubject of inquietude. It is the ſame with the law, which forbids walking in the night through the ſtreets with a torch or a lighted candle. It would be of no uſe to him who violated the law, to ſay that no miſchief happened, and that he carried the torch with ſuch circumſpection, that no ill conſequence was to be feared: it is enough that the misfortune of cauſing a fire was poſſible, to render it a duty to obey the law, and he has violated it by occaſioning a fear, which the legiſlature ſtrove to prevent.

§ 299. Of expreſſions capable of an extenſive and confined ſenſe.

We have obſerved, at the beginning of this chapter, that the ideas of men and their language are not always exactly determined. There is, doubtleſs, no language that does not afford expreſſions, words, or entire phraſes, capable of a ſenſe more or leſs extenſive. Such a word agrees equally with the kind and the ſpecie; that of *fault* comprehends *defect*, and *guilt*; many animals, have only one name common to the two ſexes, as a *partridge*, a *plover*, a *pigeon*, &c. when we ſpeak of *horſes* only with reſpect to the ſervice they are of to men, we alſo comprehend under that name the *mares*. A word in the language of an art has ſometimes a more, and ſometimes a leſs extenſive ſenſe, than in vulgar uſe: the word *death*, among civilians, ſignifies not only natural death, but alſo civil death: *verbum* in the Latin grammar, ſignifies only that part of ſpeech called the verb; but in common uſe it ſignifies any word in general. Frequently alſo the ſame phraſe implies more things on one occaſion, and leſs in another, according to the nature, or matter of the ſubject; to *ſend for ſuccours*, ſometimes extends to ſuccours of ſoldiers,

diers, kept up and paid by him who ſends them; ſometimes to ſuccours of troops, kept at the expence of him who receives them. It is then neceſſary to eſtabliſh rules for the interpretation of theſe indeterminate expreſſions, to point out the caſes where they ought to be taken in the more extenſive ſenſe, and thoſe where they ſhould be reduced to that which is more limited. Many of the rules we have already given may ſerve for this purpoſe.

§ 300. Of things favourable, and things odious.

But we ſhould particularly regard the famous diſtinction of things *favourable* and things *odious*. Some have rejected it (*a*); doubtleſs for want of underſtanding it. In fact, the definitions that have been given of what is *favourable* and *odious*, are not fully ſatisfactory, nor eaſily applied. After having maturely conſidered what the moſt able perſons have written on the ſubject; the whole queſtion, and the juſt idea of this famous diſtinction ſeems to me to be reduced to this: when the diſpoſitions of a law or convention are plain, clear, determinate, and applied with certainty, and without difficulty, there is no room for any interpretation, or any comment (§ 263.). The preciſe point of the will of the legiſlature, or of the contracting powers, is what ought to be followed: but if their expreſſions are indeterminate, vague, or ſuſceptible of a more or leſs extenſive ſenſe; if this preciſe point of their intention in the particular caſe in queſtion, cannot be diſcovered and fixed, by other rules of interpretation, it ſhould be preſumed, according to the laws of reaſon and equity; and for this purpoſe, it is neceſſary to pay attention to the nature of the things to which it relates. There are things in which equity allows of greater extenſion than reſtriction; that is, with reſpect to theſe things, the preciſe point of the will not being diſcovered in the expreſſions of the law or the contract, it is ſafeſt, and more

(*a*) See Barbeyrac's Remarks on Grotius and Puffendorf.

conſiſtent

conſiſtent with equity, to place this point, and to ſuppoſe it in the more extenſive ſenſe, than in the more confined ſenſe of the terms; to extend the ſignification of the terms, than to limit them: theſe are the things called *favourable*. The *odious*, on the contrary, are thoſe, where the reſtriction tends more certainly to equity, than their extenſion. Let us figure to ourſelves the intention, or the will of the legiſlature, or the contracting powers, as a fixed point. If this point be clearly known, we ſhould ſtop preciſely there: if it be uncertain, we ſhould endeavour at leaſt to approach towards it. In things favourable, it is better to paſs beyond this point, than not to reach it; in things odious, it is better not to reach it, than to paſs beyond it.

§ 301. What tends to the common advantage, and to equality, is favourable, the contrary is odious.

It will not now be difficult to ſhew, in general, what things are *favourable*, and what are *odious*. And firſt, *every thing that tends to the common advantage in conventions, or that has a tendency to place the contracting powers on an equality*, is *favourable*. The voice of equity requires, that the conditions between the parties ſhould be equal, this is the general rule of contracts. We do not preſume to think, without very ſtrong reaſons, that one of the contracting powers has intended to favour the other to his own prejudice; but there is no danger of extending what is for the common advantage. If it then be found, that the contracting powers have not made known their will with ſufficient clearneſs, and with all the preciſion required, it is certainly more conformable to equity, to ſeek for this will in the ſenſe moſt favourable to the common advantage and equality, than to ſuppoſe it in the contrary ſenſe. From the ſame reaſon, every thing that is not for the common advantage, every thing that tends to deſtroy the equality of a contract, every thing that lays a burden on only one of the parties, or that lays a greater load on him than on the other, is odious. In a treaty of ſtrict friendſhip,

ſhip, union, and alliance, every thing which, without being burdenſome to any of the parties, tends to the common welfare of the confederacy, and to tie cloſer the knot, is favourable. In unequal treaties, and eſpecially in unequal alliances, all the clauſes of inequality, and principally thoſe that burden an inferior ally, are odious. Upon this principle, that in caſe of doubt, we ought to extend what leads to equality, and to limit what deſtroys it, is founded on this well-known rule; the cauſe of him who ſeeks to avoid a loſs, is more favourable than that of him who endeavours to obtain profit: *incommoda vitantis melior, quam commoda petentis eſt cauſa (a).*

§ 302. What is of uſe to the human ſociety, is favourable; the contrary is odious.

All the things which, without too much burdening any one perſon in particular, are uſeful and ſalutary to human ſociety, ought to be reckoned among the favourable things. For a nation is already under a natural obligation with reſpect to things of this nature; ſo if it has in this reſpect entered into any particular engagements, we run no riſk in giving theſe engagements the moſt extenſive ſenſe they are capable of receiving. Can we be afraid of doing a violence to equity by following the law of nature, and in giving the utmoſt extent to obligations that are for the common advantage of mankind? Beſides, things uſeful to human ſociety, on this account, tend to the common advantage of the contracting powers, and are conſequently favourable (ſee the preceding ſection). Let us, on the contrary, *conſider as odious, every thing that, in its own nature, is rather hurtful, than of uſe to the human race.* The things that contribute to the bleſſings of peace are favourable; thoſe that lead to war are odious.

§ 303. What contains a penalty is odious.

Every thing that contains a penalty is odious. With reſpect to the laws, the whole world are agreed, that in caſe of doubt the judge ought to be inclined to the merciful ſide,

(a) *Quint Inſtit. Orat. Lib.* VII. *Cap.* IV.

and

and that it is indiſputably better to ſuffer a guilty man to eſcape, than to puniſh one who is innocent. In treaties, the penal clauſes lay a burden upon one of the parties; they are therefore *odious* (§ 301.)

§ 304. What renders an act null is odious.

What tends to render an act null, and without effect, either in the whole or in part, and conſequently every thing that introduces any change in the things already agreed upon, is odious. For men treat together for their common advantage; and if I have ſome advantage acquired by a lawful contract, I cannot loſe it any otherwiſe than by renouncing it. When therefore I conſent to new clauſes, that ſeem to derogate from it, I can loſe my right only ſo far as I have clearly given it up, and conſequently theſe new clauſes ought to be taken in the ſtricteſt ſenſe they will admit of; this is the caſe of things odious (§ 300.). If what may render a treaty null and without effect is contained in the treaty itſelf, it is evident that it ought to be taken in the ſtricteſt ſenſe, and that moſt which is proper to allow, the treaty to ſubſiſt. We have already ſeen, that we ſhould reject every interpretation that tends to render the treaty null and without effect (§ 283.).

§ 305. That which tends to change the preſent ſtate of things is odious, the contrary is favourable.

We ought to place here in the number of things odious, whatever tends to change the preſent ſtate of things. For the proprietor can only loſe ſo much of his right as he has ceded of it; and in a caſe of doubt, the preſumption is in favour of the poſſeſſor. It is leſs contrary to equity, not to give to a proprietor what he has loſt the poſſeſſion of by his negligence, than to ſtrip the juſt poſſeſſor of what lawfully belongs to him. The interpretation then is that we ought rather to hazard the firſt inconvenience than the laſt. We might apply here, to many caſes, the rule we have mentioned in § 301. that the cauſe of him who ſeeks to avoid a loſs, is more favourable than that of him who deſires to acquire gain.

§ 306. Of things mixed.

In ſhort, there are things, which taken together, tend to what is *favourable* or *odious*, according to the ſide on which they

they are viewed. What derogates from treaties, or changes the ſtate of things, is odious; but if it promotes the advantages of peace, it is in this particular favourable. Penalties always partake of what is odious: however, they may be referred to favourable things, on ſuch occaſions where they are particularly neceſſary for the ſafety of ſociety. When it is required to interpret things of this nature, we ought to conſider whether what is favourable in them, greatly exceeds what appears odious; whether the advantages they procure, by giving the terms the full extent they will bear, is much ſuperior to what they have that is ſevere and odious; and, in this caſe, they are reckoned in the number of favourable things. Thus an inconſiderable change in the ſtate of things, or in conventions, is reckoned as nothing, when it procures the precious advantages of peace. In the ſame manner, the fulleſt ſenſe may be given to penal laws in critical occaſions, where rigour is neceſſary to the ſafety of the ſtate. Cicero cauſed the accomplices of Cataline to be executed by a decree of the ſenate, the ſafety of the republic rendering it improper to wait till they were condemned by the people. But without this diſproportion, all other things being equal, the favour is on the ſide that offers nothing odious; I would ſay, that we ought to abſtain from things that are odious, unleſs the benefit they procure, ſo greatly ſurpaſſes what there is in them that is odious, that it makes it in ſome ſort diſappear. While what is odious and what is favourable are ever ſo little balanced in things that are mixed, they are placed in the ranks of odious things; and that even from a conſequence of the principles, on which we have founded the diſtinction between things favourable and odious (§ 300.); becauſe, in caſe of doubt, we ſhould prefer the ſide, where we are leaſt expoſed to offend againſt equity. We ſhould reaſonably

ſonably refuſe, in doubtful caſes, to give ſuccours, though a thing favourable, when it is required to give them againſt an ally, which would be odious.

§ 307. Interpretation of things favourable.

The following are the rules of interpretation, which flow from the principles we have juſt laid down.

1. *When the ſubject relates to things favourable, we ought to give the terms all the extent they are capable of in common uſe; and if a term has many ſignifications, the moſt extenſive ought to be preferred.* For equity ought to be the rule of all men, wherever a perfect right is not exactly determined, and known with preciſion. When the legiſlature, or the contracting powers, have not expreſſed their will in terms that are preciſe and perfectly determinate, it is to be preſumed, that they deſire what is moſt equitable. Now, in relation to favourable things, the moſt extenſive ſignification of the terms, is more agreeable to equity, than their confined ſignification. Thus Cicero pleading for Cecina, juſtly maintained, that the interlocutory decree, which ordained the reſtoring to poſſeſſion, him who has been driven from his inheritance, ought alſo to be extended to him who is hindered by force from entering into it (*a*); and the Digeſt decides it in the ſame manner (*b*). It is true, that this deciſion is founded on the rule taken from parity of reaſon (§ 290.). For it is all one, in effect to drive a perſon from his inheritance, and to hinder his entering into the poſſeſſion of it by force; and there are in the two caſes the ſame reaſons for reſtoring him.

2. *In things favourable, the terms of art ought to be taken in the fulleſt extent they are capable of; not only according to common uſe, but alſo as technical terms, if he who ſpeaks underſtands the art to which thoſe terms belong, or if he conducts himſelf by the advice of men, who underſtand that art.*

(*a*) *Orat. pro. Cæcina, Cap.* XXIII.
(*b*) *Digeſt. Lib.* XLIII. *Tit.* XVI. *De vi, & vi armata, Lib.* I. & III.

3. *But we ought not from this ſingle reaſon, that a thing is favourable, to take the terms in an improper ſignification; this is only allowable to be done, to avoid abſurdity, injuſtice, or the nullity of the act*, as is practiſed on every ſubject (§ 282, 283.). For we ought to take the terms of an act in their proper ſenſe, conformable to cuſtom, at leaſt, if we have not very ſtrong reaſons for deviating from it (§ 271.).

4. *Though a thing appears favourable when viewed in one particular light, yet if the propriety of the terms, in their full extent, lead to abſurdity or injuſtice, their ſignification ought to be limited according to the rules given above* (§ 293, 294.). For here the thing becomes *mixed*, in this particular caſe, and even ought to be placed in the rank of things odious.

5. For the ſame reaſon, *if there really flows neither abſurdity nor injuſtice from the ſtrict propriety of the terms, but a manifeſt equity, or great common utility, requires a reſtriction, we ought to adhere to the moſt limited ſenſe which the proper ſignification can admit, even in an affair that appears favourable in its own nature.* Becauſe here the ſubject is ſtill mixed, and in a particular caſe ought to be eſteemed odious. As to the reſt, we ought always to remember, that all theſe rules relate only to doubtful caſes; ſince we ought not to ſtrive to interpret what is clear and indeterminate (§ 263.). If any one has clearly, and in due form, laid himſelf under an obligation to do what is burdenſome, he has done it freely; and he cannot afterwards be allowed to complain of a want of equity.

§ 308. Interpretation of things odious.

Since odious things are thoſe where the reſtriction tends more certainly to equity, than their extenſion: and ſince we ought to take the part moſt agreeable to equity, when the will of the legiſlature, or of the contracting powers, is not exactly determined, and preciſely known; we ſhould in relation to things odious, take the terms in the moſt confined ſenſe, and even, to a certain degree, may admit the figurative, to remove

remove the burdenſome conſequences of the proper and literal ſenſe, or what it contains that is odious. For we favour equity, and fly from what is odious, ſo far as that may be done, without going directly contrary to the tenor of the writing, and without doing violence to the terms. Now neither the confined, nor even the figurative ſenſe, does any violence to the terms. If it is ſaid in a treaty, that one of the allies ſhall furniſh ſuccours of a certain number of troops at his own expence, and that the other ſhall furniſh the ſame number of auxiliary troops at the expence of him who ſends for them: there is ſomething odious in the engagements of the firſt, ſince that ally is more burdened than the other: but the terms being clear and expreſs, there is no room for any reſtrictive interpretation. If in this treaty it was ſtipulated, that one of the allies ſhould furniſh ſuccours of ten thouſand men, and the other only five thouſand, without mentioning the expence, it ought to be underſtood, that the ſuccours ſhould be ſupported at the expence of him who ſhould receive them; this interpretation being neceſſary, in order that the inequality between the contracting powers might not be extended too far. Thus the ceſſion of a right, or of a province made to a conqueror, in order to obtain peace, is interpreted in its moſt confined ſenſe. If it were true, that the limits of Acadia were always uncertain, and that the French were the lawful poſſeſſors of it, that nation would have had right on their ſide in pretending, that by the treaty of Utrecht they had ceded Acadia to the Engliſh, according to its moſt confined limits.

In matters of penalty, in particular, when they are really odious, we ought not only to confine the terms of the law, or of the contract, to their ſtricteſt ſignification, and adopt the figurative ſenſe, according as the caſes require, or agree with it; but admit of reaſonable excuſes,

which is a kind of reſtrictive interpretation, tending to free the party from the penalty.

" The ſame thing muſt be obſerved with reſpect to what may render an act null and without effect. Thus when it is agreed, that the treaty ſhall be broken, as ſoon as one of the contracting powers ſhall fail to obſerve it; it would be as unreaſonable, as it would be contrary to the end of the treaty, to extend this clauſe to the ſlighteſt faults; and to the caſes where he who has committed them, is capable of bringing a juſt excuſe.

§ 309. Examples. Grotius propoſes this queſtion; If in a treaty, where mention is made of allies, we ought to extend it only to thoſe who were ſo at the time of the treaty, or to all the allies preſent and to come (*a*)? And he gives for example this article of the treaty concluded between the Romans and Carthaginians, after the war of Sicily: " that neither " of the two nations ſhould do any injury to the allies of " the other." In order to underſtand this part of the treaty, it is neceſſary to call to mind, the barbarous law of nations obſerved by the antients: they thought themſelves allowed to attack, and to treat as enemies, all to whom they were not united by any alliance. The article then ſignifies, that on both ſides they ſhould treat as friends the allies of their ally, and abſtain from moleſting or invading them: upon this footing it was in all reſpects ſo favourable, ſo conformable to humanity, and to the ſentiments which ought to unite two allies, that it ſhould, without difficulty, be extended to all the allies preſent and to come. We cannot ſay that this clauſe has an odious tendency, becauſe it puts a conſtraint upon the liberty of a ſovereign ſtate, or becauſe it tended to break an alliance. For by the engaging not to injure the allies of another power, they did not take away the liberty of making war againſt them, if they gave them a juſt cauſe for doing it; and

(*a*) *Lib.* II. *Cap.* XVI. § 13.

when

when a clauſe is juſt and reaſonable, it does not become odious, from the ſole reaſon that it may occaſion the rupture of the alliance. Upon this footing there would be no treaty but what was odious. This reaſon, which we have touched upon in the preceding ſection, and in § 304, takes place only in doubtful caſes: for example, here it ought to hinder the too eaſily concluding that the Carthaginians had attacked, without cauſe, an ally of the Romans. The Carthaginians might, without prejudice to the treaty, attack Saguntum, if they had a lawful reaſon for doing it, or in virtue of the voluntary law of nations, for only an apparent or ſpecious cauſe (Prelim. § 21.). But they might have attacked, in the ſame manner, the moſt ancient ally of the Romans; and theſe laſt might alſo, without breaking the peace, have confined themſelves to the ſuccouring of Saguntum. At preſent the allies on both ſides are comprehended in the treaty: but this does not mean, that one of the contracting powers may not make war on the allies of the other, if they give them cauſe for it; but only, that if any quarrel ariſes between them, they reſerve to themſelves the power of aſſiſting their moſt antient ally, and in this ſenſe the future allies are not comprehended in the treaty.

Another example mentioned by Grotius, is alſo taken from a treaty concluded between Rome and Carthage. When this laſt city was reduced to diſtreſs by Æmilianus Scipio, and obliged to capitulate, the Romans promiſed, "that Carthage ſhould remain free, or in poſſeſſion of the "privilege of being governed by her own laws(*a*)." However, theſe mercileſs conquerors at length pretended, that this promiſed liberty regarded the inhabitants, and not the city: they required that Carthage ſhould be razed, and that the unhappy inhabitants ſhould ſettle in a place farther diſtant from the ſea. One cannot read the account of this perfidious and cruel treatment, without being con-

(*a*) Αὐτόνομος, *Appi. De Bello Punico.*

cerned

cerned that the great, the amiable Scipio was obliged to be the inſtrument of it. Without ſtopping to examine this chicanery of the Romans, with regard to what might have been expected by Carthage; certainly the liberty promiſed to the Carthaginians, though much reſtrained, even by the ſituation of things, might well comprehend, at leaſt, the right of remaining in their city. To find themſelves obliged to abandon it, in order to ſettle elſewhere, to loſe their houſes, their port, and the advantages of their ſituation, was a ſubjection incompatible with the leaſt degree of liberty, and ſuch conſiderable loſſes they could not oblige themſelves to ſuffer, but by the moſt expreſs and formal terms.

§ 310. How we ought to interpret acts of pure liberality.

Liberal promiſes, benefits and rewards, are in their own nature among the number of favourable things, and receive an extenſive interpretation, at leaſt, if they are not burdenſome to the benefactor; if they are not too chargeable to him; or if other circumſtances do not manifeſtly ſhew, that they ought to be taken in a limited ſenſe. For goodneſs, kindneſs, beneficence, and generoſity, are liberal virtues; they do not act in a penurious manner, and know no other bounds than thoſe ſet by reaſon. But if the benefit falls too heavy upon him who grants it, in this reſpect it tends to what is odious; in caſe of doubt, equity therefore will not permit us to preſume, that it has been granted, or promiſed, according to the utmoſt extent of the terms: we ought then to confine ourſelves to that reſtrained ſignification which the words are capable of receiving; and thus reduce the benefit, within the bounds of reaſon. The ſame takes place, when other circumſtances manifeſtly point out the reſtrained ſignification, as the moſt equitable.

Upon theſe principles, the benefits of a ſovereign are commonly taken in the full extent of the terms (*a*). It

(*a*). It is not preſumed, that he will find himſelf overburdened; it is a reſpect due to majeſty to believe, that he has been led to it, from good reaſons. They are then intirely favourable in themſelves, and in order to reſtrain them, it muſt be proved that they are burdenſome to the prince, or prejudicial to the ſtate. Beſides, we ought to apply to acts of pure liberality, the general rule eſtabliſhed above (§ 270.); if theſe acts are not preciſe and very determinate, they ſhould be underſtood of what the author had probably in his mind.

§ 311. Of the colliſion of the laws or treaties.

Let us conclude this ſubject of interpretation, with what relates to the colliſion or oppoſition of the laws or treaties. We ſhall not here ſpeak of the colliſion of a treaty with the law of nature: this laſt will doubtleſs obtain the advantage, as we have proved elſewhere (§ 160, 161, 170, and 293.). There is a colliſion or oppoſition between two laws, two promiſes, or two treaties, when a caſe is preſented in which it is impoſſible to fulfil both at the ſame time, though otherwiſe theſe laws, or theſe treaties, are not contradictory, and may be both fulfilled at different times. They are conſidered as contrary in this particular caſe, and it is required to ſhew which deſerves the preference, or to which an exception ought to be made. In order not to deceive ourſelves, and that we make the exception conformably to reaſon and juſtice, we ſhould obſerve the following rules.

§ 312. 1. Rule in caſes of colliſion.

1. *In all caſes where what is only permitted, is found incompatible with what is preſcribed; this laſt has the advantage*, for the mere permiſſion impoſes no obligation to do or not to do; what is permitted, is left to our will; we may do it, or we may not do it. But we have not the ſame liberty with reſpect to what is preſcribed; we

(*a*) This is the deciſion of the Roman law, Javolenus ſays: Beneficium imperatoris, quam pleniſſimè interpretari debemus; and he gives this reaſon for it, quod à divina ejus indulgentia proficiſcatur. *Digeſt. Lib.* I. *Tit.* IV. *De Conſtit. Princ. Leg.* 3.

are

are obliged to do it. The firſt then can produce no obſtacle, and, on the contrary, what is permitted in general, is not ſo in this particular caſe, where we cannot take advantage of the permiſſion without violating a duty.

§ 313. 2. Rule. 2. *In the ſame manner, the law or the treaty which permits, ought to yield to the law or the treaty which forbids.* For the prohibition ſhould be obeyed, and what was in its own nature, or in general permitted, is found impracticable when it cannot be done without violating a prohibition; the permiſſion in this caſe no longer takes place.

§ 314. 3. Rule. 3. Every thing being otherwiſe equal, *the law or the treaty which ordains, yields to the law or the treaty which forbids.* I ſay all things otherwiſe equal, for many other reaſons may be found that will form an exception againſt the prohibitive law, or the treaty which forbids. The rules are general, each relates to an abſtract idea, and ſhews what follows from that idea, without prejudice to the other rule. Upon this footing it is eaſy to ſee, that in general, if we cannot obey an affirmative law, without violating a negative law, we ſhould abſtain from fulfilling the firſt: for the prohibition is abſolute in itſelf: while every precept, every command, is in its own nature conſtitutional; it ſuppoſes the power, or a favourable opportunity of doing what is preſcribed. Now when one cannot do it, without violating a prohibition, the opportunity is wanting, and this contradiction of the law produces a moral impoſſibility of acting; for what is in general preſcribed, is no longer ſo in the caſe where it cannot be done without committing an action that is forbidden (*a*). Upon this foundation it is generally agreed, that it is not permitted to

(*a*) The law which forbids is in this caſe an exception to that which ordains: "Deinde utra lex jubeat "utra vetet. Nam ſæpe ea, quæ "vetat, quaſi exceptione quadam "corrigere videtur illam, quæ jubet." *Cicer. De Inventione. Lib.* II. *n.* 145.

employ

employ unlawful means to accompliſh a laudable end; as for example, to rob in order to give alms. But it is evident, that the queſtion here regards an abſolute prohibition, or caſes in which the general prohibition is truly applicable, and thence equivalent to an abſolute prohibition: there are many prohibitions where circumſtances form an exception. We ſhall explain our meaning by an example. It is expreſsly forbidden, from reaſons unknown to me, to go to a certain place under any pretence whatſoever. I am ordered to carry a meſſage; I find all the other paſſages ſhut; I therefore return back the ſame way I came, rather than take advantage of that which is ſo abſolutely forbidden. But if this paſſage is forbidden in general, only to avoid ſome damage to the fruits of the earth, it is eaſy for me to judge, that the orders I carry ought to form an exception.

As to what relates to treaties, we are not obliged to accompliſh what a treaty preſcribes, any farther than we have the power: now we have not the power of doing what another treaty forbids: in this caſe then, the colliſion forms an exception to the treaty which preſcribes, and that which forbids has the advantage: but all other things being equal, we are going to ſhew by an example, that a treaty cannot derogate from another more antient, concluded with another ſtate, nor hinder its effect, either directly or indirectly.

§. 315. 4. Rule.

4. The date of the laws or treaties furniſhes new reaſons for eſtabliſhing the exception, in the caſe where there is an oppoſition. *If the oppoſition is found between two affirmative laws, or two affirmative treaties, concluded between the ſame perſons, or the ſame ſtates, the laſt date has the advantage over the more antient.* For it is manifeſt, that theſe two laws, or two treaties ſpringing from the ſame power, the laſt may derogate from the firſt. But it is always to be ſuppoſed, that things are otherwiſe equal:

if

if there be a colliſion between two treaties made with two different powers, the more antient has the advantage. For no engagement can be entered into contrary to it, in the treaty afterwards made, and if this laſt be found, in any caſe, incompatible with the more antient one, its execution is conſidered as impoſſible; becauſe the perſon promiſing, had not the power of acting contrary to his antecedent engagements.

§ 316. 5. Rule. 5. *Of two laws, or of two conventions, in all other things equal, we ought to prefer that which is the leaſt general, and which approaches nearer to the affair to which it relates.* Becauſe what is ſpecial is liable to fewer exceptions than what is general; it is commonly more particular, and it appears to have been more warmly deſired. Let us make uſe of the following example of Puffendorf (*a*): a law forbids appearing in public with arms during the days of a feſtival; another law ordains marching in arms to a port, as ſoon as the alarum bell is heard. The alarum bell is ſounded on one of the days of the feſtival: and this laſt law ſhould be obeyed, if forming an exception to the firſt.

§ 317. 6. Rule. 6. *What will ſuffer no delay, ought to be preferred to what may be done at another time.* For this is a method of reconciling every thing, and fulfilling both obligations; but if people preferred that which might be accompliſhed, at another time they would put themſelves under the neceſſity of failing with reſpect to the firſt.

§ 318. 7. Rule. 7. *When two duties are found incompatible, the moſt conſiderable, and that which comprehends the higher degree of honeſty, and utility, merits the preference.* This rule has no need of proof. But as it relate to duties that are equally in our power, and in a manner in our choice, care ſhould be taken, not to make a falſe application of it to two duties that are not really incompatible, where one of them not giving place to the other; the obligation which

(*a*) *Jus Gent. Lib.* V. *Cap.* XII. § 23.

which binds to the firſt, takes away the liberty of fulfilling the other. For example, it is more laudable to defend a nation againſt an unjuſt aggreſſor, than to aſſiſt another in an offenſive war. But if this laſt is the more antient ally, we are not at liberty to refuſe him ſuccours in order to give them to another, for we are already bound: there is not, ſtrictly ſpeaking, any competition between theſe two duties, they are not in our choice: the more antient engagement renders, for the preſent, the ſecond duty impracticable. However, if it be required to preſerve a new ally from certain ruin, and the antient one is not reduced to the ſame extremity, this will be a caſe of the foregoing rule.

As to what relates to the laws in particular, we owe, doubtleſs, the preference to the moſt important and the moſt neceſſary. This is the grand rule in their oppoſition, it is that which merits moſt attention, and it is alſo that which Cicero places at the head of all the rules he gives on the ſubject (*a*). It is acting contrary to the general aim of the legiſlature, and contrary to the great end of the laws, to neglect one of great importance, under the pretence of obſerving another leſs intereſting, and leſs neceſſary: this is, in fact, to ſin; for a leſs good, if it excludes a greater, partakes of the nature of evil.

§ 319. 3. Rule.

8. *If we cannot acquit ourſelves at the ſame time of two things, promiſed to the ſame perſon, he is to chuſe which we ought to accompliſh*; for in this caſe he may diſpenſe with the other, and then there will be no longer any oppoſition. But if we cannot obtain any information of his will, we ought to preſume, that he would deſire what is moſt important, and prefer that. And in caſe of doubt, we ſhould do that to which we are moſt ſtrongly obliged: it

(*a*) Primùm igitur leges oportet contendere, conſiderando, utra lex ad majores, hoc eſt, ad utiliores, ad honeſtiores ac magis neceſſarias res pertineat. Ex quo conficitur ut, ſi leges duæ, aut ſi plures, aut quotquot erunt, conſervari non poſſint, quia deſcrepent inter ſe; ea maxime conſervanda putetur, quæ ad maximas res pertinere videatur. *Cicer. ubi ſupra.*

it being presumed, that he would bind us more strongly to that which is of the greatest moment.

§ 320. 9. Rule. 9. Since the strongest obligation has the advantage over the weaker, *if it happens that a treaty confirmed by oath comes in opposition to a treaty that was not sworn to, every thing else being equal, the first has the advantage.* Because the oath adds a new force to the obligation. But as it makes no change in the nature of treaties (§ 225. and following); it cannot, for example, give the advantage to a new alliance, to the prejudice of the more antient one, though that treaty has not been confirmed by an oath.

§ 321. 10. Rule. 10. By the same reason, *all other things being equal, what is imposed under a penalty, has the advantage of what is not enforced by one; and what bears a greater penalty, over what bears a less.* For the sanction and penal convention strengthen the obligation: they prove that the thing was more warmly desired (*a*), and that in proportion as the penalty is more or less severe.

§ 322. A general remark on the manner of observing all the preceding rules. All the rules contained in this chapter ought to be combined together, and the interpretation made in such a manner, that it may be accommodated to all, so far as they are applicable to the case. When these rules appear opposite, they reciprocally balance and limit each other, according to their strength and importance, and according as they more particularly belong to the case in question.

(*a*) This is also the reason which Cicero gives: *Nam maxime conservanda est ea (lex), quæ diligentissima, & sancta est, vel potiùs quæ diligentissimè sancta est.* Cicer. ubi supra.

CHAP.

CHAP. XVIII.

Of the Manner of terminating the Diſputes between Nations.

§ 323. A general direction on this ſubject.

THE differences that ariſe between nations, or their conductors, have their ſource either from rights in litigation, or from injuries. A nation ought to preſerve the rights which belong to it, and the care of its ſafety and glory, does not permit it to ſuffer injuries. But in fulfilling what it owes to itſelf, it is not permitted to forget its duties toward others. Theſe two views combined together, furniſh the maxims of the law of nations, on the manner of terminating the diſputes between different ſtates.

§ 324. Every nation is obliged to give ſatisfaction with reſpect to the juſt complaints of another.

All that we have ſaid in Chap. I. IV. and V. of this book, diſpenſe with our proving here, that a nation ought to do juſtice to all others with reſpect to their pretenſions, and to remove all their juſt ſubjects of complaint. It is then obliged to render to every one what is its due, to leave them in the peaceable enjoyment of their rights, to repair the damage it may have cauſed, or the injury it has done; to give a juſt ſatisfaction for an injury it cannot repair, and reaſonable ſureties for what has given cauſe of fear. Theſe are ſo many maxims evidently dictated by that juſtice which the law of nature impoſes no leſs on nations than on individuals.

§ 325. How nations may abandon their rights and juſt complaints.

Every one is permitted to recede from his rights, to abandon a juſt ſubject of complaint, or to forget an injury. But the conductor of a nation is not, in this reſpect, ſo free as a private perſon. The latter may hear only the voice of generoſity, and in an affair which intereſts none but himſelf alone, deliver himſelf up to the pleaſure he finds in doing good, to his love of peace and

and tranquillity. The repreſentative of a nation, the ſovereign cannot conſult himſelf, cannot abandon himſelf to his own inclination. He ought to regulate his conduct on the greateſt advantage of the ſtate, combined with the univerſal good of human nature, from which it is inſeparable. It is neceſſary, that on all occaſions, the prince ſhould conſider with wiſdom, and execute with firmneſs, what is more ſalutary to the ſtate, moſt conformable to the duties of the nation towards others; and that he ſhould at the ſame time conſult juſtice, equity, humanity, ſound policy, and prudence. The rights of the nation are benefits, of which the ſovereign is only the adminiſtrator, and he ought to diſpoſe of them no farther, than as he has reaſon to preſume that the nation itſelf would diſpoſe of them. And as to what relates to injuries; it is often laudable in a citizen generouſly to pardon them. He lives under the protection of the laws, the magiſtrate knows how to defend, or to revenge him on the ungrateful and miſerable wretches, who emboldened by his goodneſs, offend him anew. A nation has not the ſame defence: ſeldom is it ſafe for it to diſſemble or to pardon an injury, unleſs it be manifeſtly in a ſituation to cruſh thoſe who are ſo raſh as to dare to offend it. It is then glorious to pardon thoſe who acknowledge their faults:

Parcere ſubjectis, & debellare ſuperbos:

And it may do this with ſafety. But between powers that are nearly equal, ſuffering an injury, without requiring a compleat ſatisfaction, is almoſt always imputed to weakneſs or cowardice; it is the means of ſoon receiving from them thoſe that are the moſt atrocious. Why do we often ſee quite the contrary practiſed by thoſe who imagine that they are elevated far above other men? Scarce can the weak, who have the misfortune to offend them, make ſubmiſſions that are ſufficiently humbling: they behave with more moderation to thoſe whom they cannot puniſh without danger.

If

§ 326. Of the means which the law of nature recommends to put an end to disputes. 1. Of amicable accommodations.

If none of the nations, who have disputes with each other, think proper to abandon their rights or pretensions, the law of nature, which recommends peace, concord, and charity, obliges them to attempt the mildest methods of terminating their differences. These are first an amicable accommodation. Let every one with tranquillity and good faith examine the subject of the dispute, and dispense justice, or let him whose right is too uncertain, voluntarily renounce it. There are even occasions where it may be convenient for him who has the clearest right, to renounce it, for the preservation of peace: prudence consists in knowing them. To renounce a right in this manner, is not to abandon or neglect it. You are under no obligation for what you abandon: but you make a friend by ceding amicably what is the subject of dispute.

§ 327. Of negociation.

Negociation is a second method of peacefully terminating disputes, in which without precisely deciding the justice of the opposite pretensions, they recede on both sides, and agree that each shall have the thing contested, or they agree to give it entirely to one of the parties on condition of certain advantages granted to the other.

§ 328. Of mediation.

Mediation, in which a common friend interposes his good offices, is often found effectual, to engage the contending parties to draw towards a reconciliation, to come to a good understanding, and to agree, either to relinquish their rights, or if the affair relates to an injury, to offer and accept a reasonable satisfaction. This office requires as much rectitude as prudence and dexterity. The mediator ought to observe an exact impartiality; he should soften reproaches, calm resentments, and draw minds towards each other. His duty is to favour what is right,

and

and to cauſe to be reſtored what belongs to each: but he ought not ſcrupulouſly to inſiſt on rigorous juſtice. He is a moderator, and not a judge: his buſineſs is to procure peace; and to bring him who has right on his ſide, if it be neceſſary, to relax ſomething with a view to ſo great a bleſſing.

The mediator is not the guarantee of the treaty he has brought to a concluſion, unleſs he has expreſsly entered into the guaranty. This is an engagement of too great conſequence to burden any one with, without his conſent clearly ſhewn. At preſent, when the affairs of the ſovereigns of Europe are ſo connected, that each has an eye on what paſſes between thoſe who are moſt diſtant, mediation is a method of reconciliation much uſed. Does any diſputes ariſe? The friendly powers, thoſe who are afraid of ſeeing the flame of war kindled, offer their mediation, and make overtures of peace and accommodation.

§ 329. Of arbitration.

When ſovereigns cannot agree about their pretenſions, and yet deſire to maintain, or to reſtore peace, they ſometimes truſt the deciſion of their diſputes to arbitrators choſen by common agreement. As ſoon as the compromiſe is concluded, the parties ought to ſubmit to the ſentence of the arbitrators; they have engaged to do this, and the faith of treaties ſhould be regarded.

However, if by a ſentence manifeſtly unjuſt, and contrary to reaſon, the arbitrators have ſtripped themſelves of their quality, their judgment deſerves no attention; the parties ſubmit to it only upon doubtful queſtions. Suppoſe the arbitrators, in order to repair ſome offence, condemn a ſovereign ſtate to become ſubject to the offended; will any ſenſible man ſay, that this ſtate ought to ſubmit?

If

If the injuſtice is of ſmall conſequence, it ſhould be borne for the ſake of peace; and if it is not abſolutely evident, we ought to ſupport it, as an evil to which we have willingly conſented to expoſe ourſelves. For if it were neceſſary to be convinced of the juſtice of a ſentence in order to ſubmit to it, it would be of very little uſe to take arbitrators.

We need not fear, that in granting the parties the liberty of not ſubmitting to a ſentence, that is manifeſtly unjuſt and unreaſonable, we ſhould render the arbitration uſeleſs; beſides, this deciſion is not contrary to the nature of the ſubmiſſion, or compromiſe. There can be no difficulty in it, but in the caſe of a vague and unlimited ſubmiſſion, in which they have neither preciſely determined what conſtitutes the ſubject of the quarrel, nor marked out the limits of the oppoſite pretenſions. It may then happen, as in the example juſt alledged, that the arbitrators may exceed their power, and paſs their judgment on what has not been really ſubmitted to their deciſion: and being called to judge of the ſatisfaction a ſtate ought to make for an offence, they may condemn it to become ſubject to the offended. Certainly that ſtate never gave them ſo extenſive a power, and their abſurd ſentence is not binding. To avoid all difficulty, and to take away every pretence from bad faith, it is neceſſary to determine exactly in the compromiſe, the ſubject of the diſpute, the reſpective and oppoſite pretenſions, the demands of the one, and the oppoſitions of the other. This is what is ſubmitted to arbitrators, and upon this they promiſe to adhere to their judgment. If then their ſentence is confined within theſe bounds, it is neceſſary to ſubmit to it. It cannot be ſaid that it is manifeſtly unjuſt, ſince it is pronounced on a queſtion which the diſſention of the parties renders doubtful, and which has been ſubmitted as

ſuch. In order to be free from ſuch a ſentence, it ſhould be proved by indubitable facts, that it was produced by corruption, or a flagrant partiality.

Arbitration is a method very reaſonable, and very conformable to the law of nature, in determining all differences that do not directly intereſt the ſafety of the nation. Though the ſtrict right may be miſtaken by the arbitrator, it is ſtill more to be feared that it will be overwhelmed by the fate of arms. The Swiſs have had the precaution, in all their alliances among themſelves, and even in thoſe they have contracted with the neighbouring powers, to agree before-hand, on the manner in which their diſputes were to be ſubmitted to arbitrators, in caſe they could not adjuſt them in an amicable manner. This wiſe precaution has not a little contributed to maintain the Helvetic Republic in that flouriſhing ſtate which ſecures its liberty, and renders it reſpectable throughout Europe.

§ 330. Of conferences and congreſſes.

In order to put in practice any of theſe methods, it is neceſſary to ſpeak with each other and to confer together. Conference and congreſſes are then a way of reconciliation, which the law of nature recommends to nations, as proper to put an amicable period to their differences. Congreſſes are aſſemblies of plenipotentiaries appointed to find out methods for a reconciliation, and to diſcuſs and adjuſt their reciprocal pretenſions. In order to expect an happy ſucceſs from them, it is neceſſary that theſe aſſemblies ſhould be formed and directed by a ſincere deſire of peace and concord. Europe has, in the preſent age, ſeen two general congreſſes, that of Cambray (*a*), and that of Soiſſons (*b*). Dull farces played on the political theatre, in which the principal actors were leſs deſirous of pro-

(*a*) In 1724. (*b*) In 1728.

ducing

ducing an accommodation than of appearing to desire it.

§ 331. A distinction to be made between evident and doubtful cases.

In order now to see how, and to what degree a nation is to have recourse, or to submit to these various methods, and on which it ought to fix, it is necessary, first to distinguish between the cases that are evident, and those that are doubtful. Does it relate to a right that is clear, certain and incontestible? A sovereign, if he has sufficient strength, may boldly pursue and defend it, without putting it to a compromise. Shall he suffer to be contested and debated a thing that manifestly belongs to him, and which is disputed without the least shadow of right? Much less will he submit it to arbitration. But he ought not to neglect those methods of reconciliation, which, by putting his right to a compromise, may make his adversary hear reason: such are mediation and conferences. Nature gives us no right to have recourse to force, but where mild and pacific methods are ineffectual. It is not permitted to be so inflexible in uncertain and doubtful questions. Who shall dare to pretend, that another suddenly and without examination, shall abandon to him a litigated right? This would be a means of rendering war perpetual and inevitable. The two contending powers may be equally possessed of good faith: Why then should one yield to the other? In such a case they can only demand a negociation, a conference, or an arbitration.

§ 332. Of essential rights, and those of less importance.

In the disputes that arise between sovereigns, it is necessary plainly to distinguish the essential rights from those of less importance; for, in regard to these, a very different conduct is to be observed. A nation is under many obligations of duty towards itself, towards other nations, and towards the whole human society. We know that, in general, the duties towards ourselves have the

advantage over thoſe we own to others: but this ought only to extend to the duties in which ſome proportion ſubſiſt between them. We cannot refuſe, in ſome degree, to forget ourſelves with reſpect to intereſts that are not eſſential, to make ſome ſacrifices in order to aſſiſt other perſons, and eſpecially for the greater benefit of the human ſociety: and let us even remark, that we are invited by our own advantage, by our own ſafety, to make theſe generous ſacrifices; for the private good of each is intimately connected with the general happineſs. What ideas ſhould we have of a prince or a nation, who ſhould refuſe to give up the ſmalleſt advantage to procure the world the ineſtimable bleſſings of peace? Every power owes then this reſpect to the happineſs of human ſociety, to appear open to every method of reconciliation, when it relates to intereſts that are not eſſential, or that are of ſmall conſequence. If he expoſes himſelf to the loſs of ſomething by an accommodation, a negotiation or an arbitration, he ought to be ſenſible what are the dangers, the evils, the calamities of war, and to conſider that peace is well worth a ſmall ſacrifice.

But if any one would ravage from a nation an eſſential right, or a right without which it could not hope to ſubſiſt; if an ambitious neighbour threatens the liberty of a republic; if he reſolves to ſubdue it, and bring it into ſubjection, that republic will take council only from its courage. It will not even attempt to wait the method of conferences on ſo odious a pretenſion: it will bring into this quarrel all its efforts, its laſt reſources, and all the beſt blood it is capable of ſhedding. It is riſking every thing,

thing, only to liſten to the leaſt propoſition: then they might truly ſay,

Una ſalus——nullam ſperare ſalutem.

And if fortune is not favourable, a free people will prefer death to ſervitude. What would have become of Rome, had ſhe liſtened to timid councils, when Hannibal was encamped before her walls? The Swiſs, always ſo ready to embrace pacific meaſures, or to ſubmit to thoſe that are reaſonable, in diſputes leſs eſſential, conſtantly reject every idea of compoſition with thoſe who have a deſign on their liberties; they have even refuſed to ſubmit them to arbitration, or to the judgment of the Emperors (*a*).

§ 333. How we acquire a right of having recourſe to force in a doubtful cauſe.

In things doubtful and not eſſential, if one of the parties will not liſten, either to conferences, an accommodation, a negotiation, or a compromiſe; the other has only the laſt reſource for the defence of himſelf and his rights, the means of force: and his arms are juſt againſt ſo untractable an adverſary. For in a doubtful cauſe, we can only demand all the reaſonable methods of elucidating the queſtion, and of deciding or accommodating the diſpute (§ 331).

§ 334. And even without attempting other meaſures.

But let us never loſe ſight of what a nation owes to its own ſecurity, or that prudence by which it ought conſtantly to be directed. It is not always neceſſary to authoriſe the having recourſe to arms, that all the methods

(*a*) When in the year 1355, they ſubmitted their differences with the Dukes of Auſtria, in relation to the countries of Zug and Claris, to the arbitration of Charles IV. it was not without this preliminary condition, that the emperor ſhould not touch the liberties of theſe countries, nor their alliance with the other cantons. *Tſchudi*, p. 429. and following *Stettler*, p. 77. *Hiſtory of the Helvetic Confederacy, by De Watteville*, Book IV. at the beginning.

of

of reconciliation have been expreſsly rejected; it is ſufficient, that there is the utmoſt reaſon to believe, that the enemy would not enter into theſe meaſures with ſincerity; that the iſſue of them could not be happy, and that a delay could only tend to put the ſtate in greater danger of being oppreſſed. This maxim is inconteſtible, but the application of it to practice is very delicate. A ſovereign who would not be conſidered as a diſturber of the public repoſe, will not be induced abruptly to attack him who has not refuſed pacific meaſures, if he is not able to juſtify to the whole world that he has reaſon to conſider theſe appearances of peace as an artifice tending to amuſe and to ſurpriſe him. To pretend to be authoriſed by his mere ſuſpicions alone, is to ſhake all the foundations of the ſafety of nations.

§ 335. Of the voluntary law of nations on this ſubject.

At all times the faith of one nation has been ſuſpected by another, and ſad experience but too plainly proves, that this diſtruſt is not ill-founded. Independence and impunity are a touchſtone that diſcovers the faults of the human heart: the private man adorns himſelf with candour and probity; and when he wants the reality, his dependence frequently obliges him to ſhew, at leaſt in his conduct, the appearance of theſe virtues. The great man, who is independent, boaſts ſtill more of them in his diſcourſe; but as ſoon as he finds himſelf ſufficiently ſtrong, if he has not an heart of a ſtamp unhappily very uncommon, he ſcarcely endeavours to ſave appearances: and if powerful intereſts intervene, he will permit proceedings that would cover a private perſon with ſhame and infamy. When, therefore, a nation pretends, that it would be dangerous to attempt pacific meaſures, it has but too many reaſons that may give a colour to its precipitation, in having recourſe to arms. And as, in virtue of the natural liberty of nations, each has a right to judge from conſcience,

ſcience, of what it ought to do, and has a right to regulate, according to its dictates, its conduct with reſpect to its duty, in every thing that is not determined by the perfect rights of another (Prelim. § 20.); it is for every one to judge, whether he is in a ſituation that will admit of pacific meaſures, before he has recourſe to arms. Now the voluntary law of nations ordains, that from theſe reaſons we eſteem lawful what a nation thinks proper to do in virtue of its natural liberty (Prelim. §. 21.); by this voluntary law we hold as juſt among nations, the arms of him who in a doubtful cauſe abruptly undertakes to force his enemy to enter into a negotiation, without having before attempted pacific meaſures. Louis XIV. was in the midſt of the Netherlands before it was known in Spain that he laid claim to part of the ſovereignty of thoſe rich provinces, in right of the queen his wife. The King of Pruſſia, in 1741, publiſhed his manifeſto in Sileſia, at the head of ſixty thouſand men. Theſe princes might have wiſe and juſt reaſons for acting thus: and this is ſufficient at the tribunal of the voluntary law of nations. But a thing tolerated by neceſſity in this law, may be found very unjuſt in itſelf. A prince who puts it in practice, may render himſelf very guilty in the ſight of his own conſcience, and very unjuſt towards him whom he attacks, though he has no account to give to nations, as he cannot be accuſed of violating the general rule, which they obſerve among themſelves. But if he abuſes this liberty, he renders himſelf odious, and ſuſpected by the nations: he authoriſes them to enter into an alliance againſt him, and thus at the time when he ſeems to advance his affairs, he ſometimes ruins them paſt recovery.

§ 336. They ought always to offer equitable conditions.

A ſovereign ought to ſhew in all his quarrels, a ſincere deſire of rendering juſtice, and preſerving peace. He is obliged, before he takes up arms, and after having taken them

them up alſo, to offer equitable conditions, and then alone his arms become juſt againſt an obſtinate enemy, who refuſes to liſten to juſtice or to equity.

§ 337. The right of the poſſeſſor in matters of doubt.

It is for the plaintiff to prove his right; for he ought to ſhew a good foundation for demanding a thing he does not poſſeſs. He muſt have a title, and people are not obliged to pay any regard to it, any farther than he ſhews its validity. The poſſeſſor may then remain in poſſeſſion, till it is made appear to him, that his poſſeſſion is unjuſt. While this is not done, he has a right to maintain himſelf in it, and even to recover it by force, if he is ſtripped of it. Conſequently it is not permitted to take arms to obtain the poſſeſſion of a thing to which the perſon has but an uncertain or doubtful right. He may only oblige the poſſeſſor, if it be neceſſary, by force of arms, to diſcuſs the queſtion, to accept ſome reaſonable method of deciſion or of accommodation; or, in ſhort, to negotiate upon an equitable footing. (§ 333.)

§ 338. How we ought to purſue the reparation of an injury.

If the ſubject of the diſpute be an injury received, the offended ought to follow the rules we have juſt eſtabliſhed. His own advantage, and that of human ſociety, oblige him to attempt, before he takes up arms, all the pacific methods of obtaining, either the reparation of the injury, or a juſt ſatisfaction; at leaſt, if he has not good reaſon to diſpenſe with it (§ 334.). This moderation, this circumſpection, is ſo much the more proper, and commonly even indiſpenſable, as the action we take for an injury does not always proceed from a deſign to offend us, and is ſometimes rather a miſtake, than an act of malice: frequently it even happens, that the injury is done by inferior perſons, without their ſovereign having any ſhare in it: and on theſe occaſions it is natural to preſume, that he would not refuſe us a juſt ſatisfaction. When ſome inferior perſons violated, not long ago, the territory of Savoy, in carrying from thence a noted chief of the ſmugglers, the King

King of Sardinia cauſed his complaints to be carried to the court of France; and Louis XV. did not think it beneath him to ſend an ambaſſador extraordinary to Turin to give ſatisfaction for that violence. Thus an affair of ſo delicate a nature was terminated in a manner equally honourable to the two Kings.

§ 339. Of retaliation.

When a nation cannot obtain juſtice either for a loſs or an injury, it has a right to do itſelf juſtice. But before it declares war, of which we ſhall treat in the following book, there are various methods practiſed among nations, which remain to be treated of here. We have placed in the number of theſe methods of obtaining ſatisfaction, what is called the law of retaliation, according to which we make another ſuffer exactly ſo much evil as he has done. Many have extolled this law, as being derived from the moſt ſtrict juſtice, and can we be aſtoniſhed at their having propoſed it to princes, when they have even dared to give it for a rule to the Deity himſelf; the ancients called it the law of Rhadamanthus. This idea only ſprung from the obſcure and falſe notions by which they repreſented to themſelves evil as eſſentially; and in its own nature worthy of puniſhment. We have ſhewn above (Book I. §169.), what is the true ſource of the right of puniſhing (*a*); where we have laid down the true and juſt proportion of penalties (Book I. § 171.). Let us ſay then, that a nation may puniſh another which has done it an injury, as we have ſhewn above (ſee Chap. IV. and VI. of this Book), if it refuſes to give a juſt ſatisfaction; but it has not a right to extend the penalty beyond what it required by its own ſafety. Retaliation, unjuſt between

(*a*) Nam, ut Plato ait, nemo prudens punit quia peccatum eſt, ſed ne peccetur. *Seneca de Ira.*

private

private perſons, would be much more ſo between nations, becauſe here the puniſhment would, with difficulty, fall on thoſe who had done the injury, what right would you have to cut off the noſe and ears of the ambaſſador of a barbarian, who had treated your's in the ſame manner? As to thoſe repriſals in time of war which partake of the nature of retaliation, they are juſtified on other principles, and we ſhall ſpeak of them in their place. All that is true in this idea of retaliation is, that every thing being equal, the pain ought to bear ſome proportion to the evil required to be puniſhed; the end and even the foundation of puniſhment requiring thus much.

§ 340. Various ways of puniſhing, without having recourſe to arms.

It is not always neceſſary to have recourſe to arms, in order to puniſh a nation; the offended may take from it, by way of puniſhment, the privileges it enjoys in his dominions; ſeize, if he has an opportunity, on ſome of the things that belong to it, and detain them till it has given him a juſt ſatisfaction.

§ 341. Of the law of retortion.

When a ſovereign is not ſatisfied with the manner in which his ſubjects are treated by the laws and cuſtoms of another nation; he is at liberty to declare, that he will treat the ſubjects of that nation in the ſame manner as his are treated. This is what is called the *law of retortion*. There is nothing in this, but what is conformable to juſt and ſound politics. No one can complain if he is treated as he treats others. Thus the King of Poland, Elector of Saxony, took advantage of the law of eſcheatage only againſt the ſubjects of the princes who made the Saxons ſubmit to it. This law of retortion may alſo take place with reſpect to certain regulations, of which we have no right to complain, and which we are even obliged to approve, though it is proper to guard againſt their effects, by imitating them. Such are the orders relating to the exportation

exportation of certain commodities or merchandize. It is alſo frequently not convenient to make uſe of retortion; in this reſpect we ought to follow the dictates of prudence.

§ 342. Of repriſals.

Repriſals are uſed between nation and nation to do juſtice to themſelves, when they cannot otherwiſe obtain it. If a nation has taken poſſeſſion of what belongs to another; if it refuſes to pay a debt, to repair an injury, or to make a juſt ſatisfaction, the other may ſeize what belongs to it, and apply it to its own advantage, till it has obtained what is due for intereſt and damage, or keep it as a pledge till a full ſatisfaction has been made. In the laſt caſe, it is rather a ſtoppage or a ſeizure, than repriſals: but they are frequently confounded in common language. Effects ſeized are preſerved while there are any hopes of obtaining ſatisfaction, or juſtice. As ſoon as this hope is loſt, they are confiſcated, and then the repriſals are accompliſhed. If the two nations, upon this quarrel, come to an open rupture, ſatisfaction is conſidered as refuſed, from the moment of the declaration of war, or the firſt hoſtilities, and then alſo the effects ſeized may be confiſcated.

§ 343. What is required to render them lawful.

The law of nations permits repriſals only upon a cauſe that is evidently juſt, or for a debt that is extremely clear. For he who forms a doubtful pretenſion, can at firſt demand only an equitable examination of his right. In the ſecond place, he ſhould, before he proceeds ſo far, have in vain demanded juſtice, or, at leaſt, have the utmoſt reaſon to believe, that it would be in vain for him to demand it. Then alone he may right himſelf. It would be too contrary to the peace, to the repoſe and ſafety of nations, to their mutual commerce, and to the duties which bind them to each other, for any one ſuddenly to apply

to

to force, without knowing whether the other is diſpoſed to do him juſtice, or to refuſe it.

But in order perfectly to underſtand this article, it muſt be obſerved, that if in a litigious affair, our adverſary refuſes the means of bringing the right to proof, or artfully eludes it; if he does not, with good faith, apply to pacific meaſures for terminating the difference; and above all, if he is the firſt who begins acts of hoſtility, he renders the cauſe juſt which was before doubtful; we may then make uſe of repriſals, or ſeize his effects to oblige him to embrace the methods of reconciliation which the law of nature preſcribes. This is the laſt attempt before coming to an open war.

§ 344. Upon what effects they are exerciſed.

We have obſerved above (§ 81.), that the wealth of the citizens form a part of the total wealth of a nation; that between ſtate and ſtate, whatever is the property of the members, is conſidered as belonging to the body, and is anſwerable for the debts of the body (§ 82.); whence it follows, that in repriſals, they ſeize the goods of the ſubject, in the ſame manner as thoſe of the ſtate, or the ſovereign. Every thing that belongs to the nation is ſubject to repriſals, as ſoon as it can be ſeized, provided it be not a depoſit truſted to the public faith. This depoſitum is found in our hands, only in conſequence of that confidence which the proprietor has put in our good faith; and it ought to be reſpected, even in caſe of open war. Thus, it is uſual to behave in France, England, and elſewhere with reſpect to the money which foreigners have placed in the public funds.

§ 345. The ſtate ought to recompenſe thoſe who ſuffer by repriſals.

He who makes uſe of repriſals againſt a nation, on the goods of its members indiſcriminately, cannot be taxed with ſeizing the wealth of an innocent perſon for the debt of

of another: for in this caſe the ſovereign is to recompenſe thoſe of his ſubjects on whom the ripriſals fall; this is a debt of the ſtate or nation of which each citizen ought only to ſupport his quota.

§ 346. The ſovereign alone can order repriſals.

It is only between ſtate and ſtate, that all the wealth of the individuals is conſidered as belonging to the nation. Sovereigns tranſact their affairs between themſelves, they carry on buſineſs with each other directly, and can only conſider a foreign nation as a ſociety of men who have only one common intereſt. It then belongs only to ſovereigns to uſe and order repriſals on the footing we have juſt explained. Beſides, this violent meaſure approaches very near to an open rupture, and is frequently followed by it. It is then of too great conſequence to be abandoned to private perſons. Thus we ſee that in all civilized ſtates, a ſubject who thinks himſelf injured by a foreign nation, has recourſe to his ſovereign in order to obtain the permiſſion of making repriſals. This is what is called deſiring *letters of marque*.

§ 347. How they may take place againſt a nation for actions of its ſubjects, and in favour of the injured ſubjects.

We may uſe repriſals againſt a nation not only for the actions of the ſovereign; but alſo for thoſe of his ſubjects; and this takes place when the ſtate, or the ſovereign, has a ſhare in the actions of his ſubjects, and takes it upon himſelf; which he may do ſeveral ways, as we have ſhewn in Chap. VI. of this Book.

In the ſame manner the ſovereign demands juſtice, or makes repriſals not only for his own affairs; but alſo for thoſe of his ſubjects whom he ought to protect, and whoſe cauſe is that of the nation.

§ 348. But not in favour of foreigners.

But to grant repriſals againſt a nation in favour of foreigners, is to ſet himſelf up for a judge between that nation and theſe foreigners; which no ſovereign has a right to do. The cauſe of repriſals ought to be juſt; it is even neceſſary,

neceſſary, that they ſhould be founded on a denial of juſtice, which has already happened, or probably feared (§ 343.). Now what right have we to judge, whether the complaint of a ſtranger againſt an independent ſtate is juſt, if he has really been denied juſtice? If it be objected, that we may eſpouſe the quarrel of another ſtate in a war that appears to us to be juſt to give it ſuccours, and even join with it; the caſe is different. In granting ſuccours againſt a nation, we do not ſtop its effects, or its men, who are with us under the public faith, and in declaring war, we ſuffer it to withdraw its ſubjects and effects, as will be afterwards ſhewn. In the caſe of repriſals granted to our ſubjects, a nation cannot complain, that we violate the public faith in ſeizing its men or its effects; becauſe we owe no ſecurity to theſe effects or to theſe men; but upon a juſt ſuppoſition that they will not firſt violate, with reſpect to us or our ſubjects, the rules of juſtice, which nations ought to obſerve towards each other: if they violate them, we have a right to bring them to reaſon, and the way of repriſals is more eaſy, ſafe, and mild, than that of war. We cannot juſtify, by the ſame reaſons, repriſals ordered in favour of foreigners. For the ſecurity we owe to the ſubjects of a foreign power does not depend, as a condition, on the ſecurity which that power ſhould give to all other nations, to men who do not belong to us, and are not under our protection. England having in 1662 granted repriſals againſt the United Provinces, in favour of the knights of Malta, the ſtates of Holland ſaid, with reaſon, that according to the law of nations, repriſals could only be granted to maintain the right of the ſubjects of the ſtate, and not for an affair in which the nation had no concern (*a*).

§ 349. Thoſe who having given cauſe

The private perſons who by their actions have given room for juſt repriſals, are at leaſt to recompenſe thoſe on

(*a*) See *Bynkerſhoeck's Competent Judge of Ambaſſadors*, Chap. XXII. § 5.

whom

whom they fall, and the ſovereign ought to conſtrain them to do it. For we are under an obligation to repair the damage we have occaſioned by our own fault. And as the ſovereign in refuſing juſtice to the offended, has drawn repriſals upon his ſubjects, thoſe who were the firſt cauſe of them, do not become the leſs guilty; the fault of the ſovereign does not exempt them from repairing the conſequences of theirs. However, if they were ready to give ſatisfaction to him whom they had injured or offended, and their ſovereign had hindered their doing it, they are only bound with reſpect to what they are obliged to do, to prevent repriſals, and the ſovereign is to repair the ſurplus of damage, the conſequence of his own fault (§ 345.).

for repriſals ought to recompenſe thoſe who ſuffer by them.

§ 350. Of what may paſs for a refuſal to do juſtice.

We have ſaid (§ 343.) that we ought not to make repriſals, till we are unable to obtain juſtice. Now juſtice is refuſed ſeveral ways: Firſt, by a denial of juſtice properly ſo called, or by a refuſal to hear your complaints, or thoſe of your ſubjects, and by not admitting them to eſtabliſh their rights before the ordinary tribunals. Secondly, by affected delays, for which no good reaſons can be given: delays equivocal to a refuſal, or ſtill more ruinous. Thirdly, by a judgment manifeſtly unjuſt and partial. But it is neceſſary that this injuſtice ſhould be evident and palpable. In all caſes ſuſceptible of doubt, a ſovereign ought not to liſten to the complaints of his ſubjects againſt a foreign tribunal, nor to attempt to deliver them from the effects of a ſentence paſſed in due form. This would be the means of exciting continual troubles. The law of nations preſcribes to different ſtates a reciprocal reſpect to the juriſdiction of each, from the ſame reaſons, that the civil law ordains, that in the ſtate every definitive ſentence, paſt in due form, ſhall be eſteemed juſt. The obligation is neither ſo expreſs, nor ſo extenſive

ſive between nation and nation; but it cannot be denied, that it is highly ſuitable to their repoſe, and their duty with reſpect to human ſociety, to oblige their ſubjects in all doubtful caſes, and at leaſt where there is a manifeſt injury, to ſubmit to the ſentences of the foreign tribunal, before which they have brought their affairs. (See above § 84.)

§ 351. Subjects ſtopped by way of reprisals.

As we may ſeize the things which belong to a nation, to oblige it to do juſtice, we may, for the ſame reaſon, arreſt ſome of the citizens, and not releaſe them till we have received intire ſatisfaction. This is what the Greeks called Ανδρολη̃ψια, *the taking of men.* At Athens the law permitted the relations of him who had been aſſaſſinated in a foreign country, to ſeize even three of the natives of that country, and to detain them till the murderer was puniſhed, or delivered up (*a*). But according to the manners of modern Europe, this method is ſeldom put in practice, except to obtain ſatisfaction for an injury of the ſame nature, that is, it is done to oblige a ſovereign to releaſe a perſon whom he detains unjuſtly.

Moreover, the ſubjects thus ſtopped being detained only as a ſecurity to oblige a nation to do juſtice, if their ſovereign is obſtinate in refuſing it, we cannot take away their lives, nor inflict any corporal pain upon them for a refuſal of which they are not guilty. Their fortunes, their liberty itſelf, may be bound for the debts of the ſtate; but not life, of which man has not the power of diſpoſing. A ſovereign has not the right to deprive thoſe of life who are the ſubjects of him who has done him an injury, except when they are at war, and we ſhall ſee elſewhere, what it is that gives him this right.

(*a*) *Demoſt. Orat. Adv. Ariſtocrat.*

But

§ 352. The right against those who oppose reprisals.

But the sovereign may make use of force against those who resist the execution of this right, and use as much as is necessary to surmount their unjust resistance. It is then permitted to repulse those who undertake to oppose the making just reprisals, and if it be necessary to go so far as even to deprive them of life, none can be accused of this misfortune; but their unjust and inconsiderate resistance. In such a case Grotius would have them rather abstain from making reprisals (*a*). Among private persons, and for things that are not of extraordinary consequence, it is certainly worthy, not only of a Christian, but in general of every good-natured man, rather to abandon his right, than to kill him who makes an unjust resistance. But this is not the case with sovereigns. It would be of too great consequence for them to suffer themselves to be braved. The true and just welfare of the state is the grand rule: moderation is always laudable in itself; but the conductors of nations ought to make use of it only so far as it is consistent with the happiness and safety of their people.

§ 353. Just reprisals do not afford a just cause for war.

After having shewn that it is permitted to make reprisals, when we can no otherwise obtain justice, it is easy to conclude from thence, that a sovereign has no right to oppose force, or to make war against him who, in such a case, by ordering the making of reprisals only exercises his just right.

§ 354. How we ought to confine ourselves to reprisals, or at length to enter into a war.

And as the law of humanity prescribes to nations no less than to individuals, the mildest measures, when they are sufficient to obtain justice; whenever a sovereign can, by way of reprisals, procure a just recompense, or a proper satisfaction, he ought to make use of this method, which is less violent, and less fatal than war.

To this purpose I cannot avoid mentioning an error here, which is too general to be absolutely despised. If it

(*a*) *De Belli & Pacis, Lib.* III. *Chap.* II. §. 6.

happens that a prince having reaſon to complain of ſome injuſtice, or ſome acts of hoſtility, and not finding his adverſary diſpoſed to give him ſatisfaction, determines to make uſe of repriſals, to endeavour to oblige him to liſten to juſtice, before he comes to an open rupture: if he ſeizes his effects, his veſſels, without declaration of war, and keeps them as pledges: you hear certain men cry out, that this is robbery. If this prince had immediately declared war, they would not have ſaid a word; they would perhaps have praiſed his conduct. Strange forgetfulneſs of reaſon, and of the juſt principles of humanity! Is not this ſaying, that nations ought to follow the laws of chivalry, to challenge each other to the liſts, and to decide their quarrels like two bravoes, in a duel? Sovereigns ought to reſolve to maintain the rights that belong to the ſtate, and to endeavour to obtain juſtice by uſing lawful methods, and always preferring the mildeſt: once more, it is extremely evident, that the repriſals of which we are ſpeaking, are means infinitely more mild and leſs fatal than war. But as they often lead to it, between powers whoſe forces are nearly equal, they ought not to engage in it till the laſt extremity. The prince then who attempts this method, inſtead of entirely coming to a rupture, is doubtleſs worthy of praiſe on account of his moderation and prudence.

Thoſe who run to arms without neceſſity are the ſcourges of the human race, barbarians, enemies to ſociety, and rebels to the law of nature, or rather to the common Father of mankind.

There are caſes, however, in which repriſals would be juſtly condemned, even when a declaration of war would not be ſo, and theſe are preciſely thoſe in which nations may with juſtice take up arms. When it relates to differences not on an act of violence, or of an injury received, but of a conteſted right; after having in vain attempted ways of reconciliation, or pacific meaſures of obtaining

obtaining juſtice, it is a declaration of war which ought to follow, and not pretended repriſals, which in ſuch a caſe would only be real acts of hoſtility, without a declaration of war, and would be contrary to the public faith as well as to the mutual duties of nations. This will more evidently appear, when we ſhall have explained the reaſons which eſtabliſh the obligation of declaring war before acts of hoſtility are begun (*b*).

But if from particular conjectures, and from the obſtinacy of an unjuſt adverſary, neither repriſals nor any of the methods of which we have been treating, are ſufficient for our defence, and for the protection of our rights, there remains the unhappy and ſad reſource of war, which will be the ſubject of the following Book.

(*b*) See *Book* III. *Chap.* IV.

THE LAW OF NATIONS.

BOOK III.

OF WAR.

CHAP. I.

Of War, and its different Kind, together with the Right of making War.

§ 1. Definition of war.

"WAR is that state in which a nation prosecutes "its right by force." We also understand by this term, the act itself, or the manner of prosecuting right by force: But it is common, and indeed more proper, in a treatise on the law of war, to understand this term in the sense we have given it.

§ 2. Of public war.

Public war is that betwixt nations or sovereigns, and carried on in the name of the public power, and by its order. This is the war we are here to consider: *private war*,

war, or that carried on between particulars, or private perſons, properly belonging to the law of nature.

§ 3. Of the right of making war.

In treating of the law of ſafety, we have ſhewn that nature gives men a right to uſe force, when it is neceſſary for their defence, and the preſervation of their rights. This principle is generally acknowledged; reaſon demonſtrates it, and nature herſelf has engraven it on the heart of man. Some fanatics indeed, taking literally the moderation recommended in the Goſpel, have idly ſuffered themſelves to be murdered, or their houſes pillaged, rather than oppoſe force to violence. But we need not be under any apprehenſions that this error will make any great progreſs. Moſt men will naturally defend themſelves and their poſſeſſions: happy if they were as well inſtructed to keep within the juſt limits which nature has preſcribed to a right granted, only through neceſſity. To mark theſe juſt limits; to moderate by the rules of juſtice, equity and humanity, a right in itſelf melancholy, though too often neceſſary, is the intention of this third book.

§ 4. Belongs only to the ſovereign power.

As nature has given to men the right of uſing force, only when it becomes neceſſary for their defence, and the preſervation of their rights (Book II. § 49, &c.) the inference is manifeſt, that ſince the eſtabliſhment of political ſocieties, a right ſo dangerous in its exerciſe, no longer remains with private perſons, except in thoſe kinds of rencounters, where ſociety cannot protect or defend them.

In the boſom of ſociety, public authority decides all the differences of the citizens, repreſſes violence, and checks the inſults of revenge. If a private perſon intends to proſecute his right againſt the ſubject of a foreign power, he may apply to the ſovereign of his adverſary, or to the magiſtrates inveſted with the public authority: and if he is denied juſtice by them, he is to have recourſe to his proper ſovereign, who is obliged to protect

tect him. It would be too dangerous to give every citizen the liberty of doing himself juſtice againſt foreigners; as every individual of a nation might involve it in war. And how could peace be preſerved between nations, if it was in the power of every man to diſturb it? A right of ſo great moment, the right of judging whether a nation has a real cauſe of complaint; whether its caſe allows of uſing force, and having recourſe to arms; whether prudence admits, and whether the welfare of the ſtate demands it; this right, I ſay, can belong only to the body of the nation, or to the ſovereign, its repreſentative. It is doubtleſs one of theſe, without which there can be no ſalutary government, and are therefore called rights of majeſty (Book I. § 45.)

Thus the ſovereign power has alone authority to make war. But as the different rights which conſtitute this power, originally reſident in the body of the nation, may be ſeparated or limited according to the will of the nation (Book I. § 31, 45.) we are to ſeek the power of making war in the particular conſtitution of each ſtate. The Kings of England, whoſe power is otherwiſe ſo limitted, having the right of making war (*a*) and peace.—Thoſe of Sweden have loſt it. Indeed the ſplendid, but deſtructive exploits of Charles XII. ſufficiently warranted the ſtates of the kingdom to reſerve to themſelves a right of ſuch importance to their ſafety.

§ 5. Of war offenſive and defenſive.

War is either *defenſive* or *offenſive*. He who takes up arms to repel the attacks of an enemy, carries on a defenſive war. He who firſt takes up arms, and attacks a nation that lived in peace with him, makes an offenſive war. The object of a defenſive war is merely ſimple; it is no other than ſelf-defence: that of offenſive

(*a*) I here ſpeak of the right conſidered in itſelf; but as a King of England can neither raiſe money nor compel his ſubjects to take up arms, without the concurrence of the parliament, his right of making war is only a ſlender prerogative, unleſs the parliament ſeconds him with ſupplies.

war

war varies with the different affairs of the nation. But, in general, it relates either to the purſuit of ſome rights, or to ſafety. One nation attacks another either to obtain ſomething it claims, revenge an injury received, prevent what its adverſary is preparing to execute, or avert a danger with which it is menaced by the other. I do not here ſpeak of the juſtice of war, that will make the ſubject of a particular chapter; all I here propoſe is to vindicate, in general, the ſeveral views and intentions for which a nation takes up arms; intentions which may furniſh lawful reaſons, or unjuſt pretences; but which are at leaſt ſuſceptible of a colour of right. I do not therefore place among the objects of offenſive war, conqueſts or the deſire of invading the property of another: ſuch a latitude, deſtitute even of pretence, is not the object of a formal war, but that of a robbery, which we ſhall conſider in its proper place.

CHAP. II.

On the Inſtruments of War, and of the raiſing of Troops, &c. their Commanders or the ſubaltern Powers in War.

§ 6. Of the inſtruments of war.

THE ſovereign is the real author of war, which is carried on in his name, and by his order. The troops, officers, ſoldiers, and, in general, all by whom the ſovereign makes war, are only inſtruments in his hands. They execute his will and not their own. The arms and all the apparatus of things uſed in war, are inſtruments of an inferior order. It is neceſſary with regard to queſtions that will occur in the ſequel, to determine preciſely what the particulars are belonging to war. Without entering here into any detail,

tail, whatever is particularly neceſſary in making war, is to be claſſed among the inſtruments of war; and things which are at all times of equal uſe, as proviſions, belong to peace; unleſs it be in certain particular junctures, when thoſe particulars appear to be abſolutely deſigned for ſupporting the war. Arms of all kinds, artillery, gun-powder, ſalt-petre, and the other ingredients of which it is made, ladders, gabions, tools, and other implements of a ſiege; materials for building ſhips of war, tents, ſoldiers, clothes, &c. theſe always belong to war.

§ 7. Of the right of levying troops.

As war cannot be carried on without ſoldiers, it is evident, that whoever has the right of making war, has alſo naturally that of raiſing troops. The latter then belongs likewiſe to the ſovereign (§ 4.) and is one of his prerogatives. (Book I. § 45.) The power of raiſing troops, or compoſing an army, is of too great conſequence in a ſtate to be entruſted to any other than the ſovereign. The ſubaltern powers are not inveſted with it; they exerciſe it only by order or commiſſion from the ſovereign. But it is not always neceſſary that they ſhould have an expreſs order. On ſuch urgent exigencies, when there is no waiting for the ſupreme order, the governor of a province, or the commandant of a place, may raiſe troops for the defence of the city or province committed to their care; and this they do by virtue of the power tacitly given them by their commiſſion, in caſes of this nature.

I ſay that this important power is the appendage of the ſovereign; it makes a part of the ſupreme prerogative. But we have already ſeen, that thoſe rights, the aſſemblage of which conſtitute the ſovereign power, may be divided (Book I. § 31. 45.) if the nation deſire it. It may then happen that a nation does not confer on its head a right ſo dangerous to liberty as that of raiſing and ſupporting troops; or at leaſt limits the execution, by making it depend on the conſent of its repreſentatives.

The

The King of England, who has the right of making war, has alſo, indeed, that of granting commiſſions for raiſing troops; but he cannot compel any perſon to enliſt, nor, without the concurrence of the parliament, keep an army on foot.

§ 8. Obligations of the ſubject.

Every member of a ſociety is obliged to ſerve and defend the ſtate as far as he is capable. Society cannot otherwiſe be maintained; and this concurrence for the common defence is one of the principal intentions of every political aſſociation. Every man capable of carrying arms, ſhould take them up, at the firſt order of him who has the power of making war.

§ 9. Of enliſting, or raiſing of troops.

In ancient times, eſpecially in ſmall ſtates, every member, on a declaration of war, was a ſoldier; the whole community took up arms, and followed to the war. Soon after a choice was made, and armies formed of picked men, the remainder of the people purſuing their common occupations. At preſent the uſe of regular troops is almoſt every where adopted, eſpecially in powerful ſtates. The public authority raiſes ſoldiers, diſtributes them into different bodies, under the command of generals and other officers, and keeps them on foot as long as it thinks neceſſary. As every citizen or ſubject is obliged to ſerve the ſtate; the ſovereign has a right, in caſe of neceſſity, to enliſt whom he pleaſes. But he ſhould chooſe only ſuch as are proper for the occupation of war; and it is highly proper to take, as far as poſſible, only volunteers, who enliſt cheerfully without compulſion.

§ 10. Whether there are any exemptions from carrying arms.

No perſon is naturally exempt from taking up arms in defence of the ſtate; the obligation of every member of ſociety being the ſame. They only are excepted who are incapable of handling arms, or ſupporting the fatigues of war. This is the reaſon why old men, children, and women are exempted. There are indeed women as brave and robuſt as men, but this is not uſual; and rules muſt be general, and formed on what is moſt commonly

monly ſeen. Beſides, women are neceſſary for other ſervices in ſociety; and the mixture of both ſexes in armies would be attended with too many inconveniencies.

A good government ſhould, as far as poſſible, employ all the citizens, diſtribute the poſts and employments in ſuch manner, that the ſtate may be the beſt ſecured in all its affairs. Therefore when not compelled by neceſſity, it ſhould exempt from military ſervice, all who are employed in ſtations uſeful or neceſſary to ſociety. Magiſtrates are therefore uſually excepted, their whole time not being too much for the adminiſtration of juſtice, and the maintenance of order.

The clergy cannot naturally, and by any right, arrogate to themſelves a particular exemption. To defend one's country is an action not unworthy of the moſt ſacred hands. The canon law, by prohibiting eccleſiaſtics from ſhedding human blood, is a convenient invention for ſhielding from danger thoſe who are often ſo eager in kindling the flame of diſcord, and exciting bloody wars. Indeed the reaſons alledged above in favour of the magiſtrates, plead alſo in behalf of that part of the clergy who are truly uſeful; thoſe who teach religion govern the church, and celebrate the public worſhip (*a*).

But thoſe immenſe multitudes of uſeleſs religious, who, under pretence of dedicating themſelves to God, in effect give themſelves up to an effeminate idleneſs, by

(*a*) Formerly biſhops went to war in virtue of their fiefs, and carried with them their vaſſals. The Daniſh biſhops were often very alert in a function which pleaſed them better than the tranquil care of their epiſcopal functions. The famous Abſalon, biſhop of Roſchild, and afterwards archbiſhop of Lunden, was the principal general of king Valdemar I. And ſince the uſe of regular troops has put a period to this feudal ſervice, there have not been wanting ſome martial prelates, who have affected to be ſeen at the head of armies. The cardinal de la Valette, and Sourdis archbiſhop of Bourdeaux, appeared in arms under the miniſtry of cardinal Richelieu, who alſo acted himſelf in a military capacity at the attack of the paſs of Suſa. This is an abuſe which the church very juſtly oppoſes. A biſhop makes a better appearance in his dioceſe than in the army, and at preſent, ſovereigns are in no want of generals and officers, who will perform their buſineſs more effectually than can be expected from churchmen. In ſhort, let every perſon keep to his ſtation. All I diſpute with the clergy is an exemption of right, and in caſes of neceſſity.

what

what right do they pretend to a prerogative pernicious to the ſtate? And if the prince exempts them from military ſervice, does he not injure the other members, on whom he thus throws the whole burden? I do not pretend to adviſe a prince to fill his armies with monks, but gradually to diminiſh a uſeleſs claſs of men, by taking from it injurious and ill-grounded privileges. Hiſtory mentions a martial biſhop (*b*), whoſe weapon was a club, with which he knocked down the enemy, to avoid the irregularity of ſhedding their blood. It would be much more reaſonable if, in order to exempt the religious from carrying arms, they were employed in laborious works for the relief of the ſoldiers. Many have, with a zeal highly commendable, condeſcended to perform this taſk in caſes of neceſſity. I could mention more than one famous ſiege, where the religious have done good ſervice in defence of their country. When the Turks beſieged Malta, the eccleſiaſtics, the women, the very children, all, according to their reſpective ſtrength or ſtation, contributed to that glorious defence, which baffled all the attempts of the Ottoman empire.

There is another claſs of idle perſons, the exemption of whom is ſtill more culpable, I mean that uſeleſs multitude of footmen, who fill the houſes of the great and wealthy; a claſs who by their calling corrupt themſelves by diſplaying the luxury of their maſter.

§ 11. Soldiers pay and quarters.

Among the Romans, while all the people ſerved alternately in war, their ſervice was gratuitous; but when a choice is made, and ſtanding armies are formed, the ſtate is to pay them: no perſon owing more than his quota of the public ſervice: and if the ordinary revenues are not ſufficient, it muſt be provided for by impoſts. It is juſt that they who do not ſerve ſhould pay their defenders.

(*b*) A biſhop of Beauvais, under Philip Auguſtus. He fought at the battle of Bouvines.

When

When the ſoldier is not in the field, there is a neceſſity of quartering him. This burden naturally falls on houſe-keepers; but as it is attended with many inconveniencies to the people, it becomes a good prince, or a wiſe and equitable government, to eaſe them of it as far as poſſible. The King of France has taken care of this by building handſome and convenient barracks in many places for quartering the garriſon.

§ 12. Of hoſpitals for invalids.

The aſylums prepared for ſoldiers and reduced officers, who are grown old in the ſervice, or whom fatigues or the enemy have rendered incapable of providing ſubſiſtence for themſelves, may be conſidered as part of the military pay. The ſplendid ſtructures, and the ample proviſion made in favour of invalids, both in France and England, do honour to the ſovereign and the nation, which thus liberally diſcharge a ſacred debt. The care of theſe unfortunate victims of war is the indiſpenſable duty of every ſtate, in proportion to its ability. It is contrary, not only to humanity, but to the ſtricteſt juſtice, that generous citizens, heroes, who have ſhed their blood for the ſafety of their country, ſhould be left to periſh with want, or unworthily forced to beg for a ſubſiſtence. The honourable maintenance of ſuch perſons might very properly be impoſed upon rich convents, and large eccleſiaſtical benefices. Nothing can be more juſt than that thoſe citizens who are exempted from all the dangers of wars, ſhould beſtow part of their riches for the relief of their valiant defenders.

§ 13. Of mercenary ſoldiers.

Mercenary ſoldiers are foreigners voluntarily engaging to ſerve the ſtate for money, or a ſtipulated pay. As they owe no ſervice to a ſovereign, whoſe ſubjects they are not, the proſpect of advantage is their ſole motive. By enliſting they incur the obligation of ſerving him, and the prince on his part promiſes them conditions which are ſettled in the capitulation. This capitulation being the rule and meaſure of the reſpective obligations and rights

rights of the contracting parties, is to be religiouſly obſerved. The complaints of the French hiſtorians againſt ſome Swiſs troops, which on ſeveral occaſions have formerly refuſed to march againſt the enemy, and have even withdrawn, becauſe they were not paid: theſe complaints, I ſay, are equally ridiculous and unjuſt. Why is one of the parties more ſtrongly bound by a capitulation than the other? if a prince fails of performing what he promiſed, foreign ſoldiers are diſcharged from any farther duty to him. I own it would be ungenerous to forſake a prince when, by an accident, and without any fault of his own, he ſhould for a time be unable, or not in a condition to make good his payments; circumſtances may happen when this inflexibility muſt be conſidered, if not ſtrictly unjuſt, at leaſt as very contrary to equity; but this was never the caſe of the Switzers. They never were known to abandon the ſervice at the firſt muſter after a failure of payment, and when they perceived the good intentions of a ſovereign labouring under a real inability of ſatisfying them, their patience and zeal always ſupported them under ſuch difficulties. Henry the IVth owed them immenſe ſums; yet they did not, in his greateſt neceſſities, abandon him: and that hero found the nation equally generous and brave. I here ſpeak of the Switzers, becauſe in reality they were often mere mercenaries. But we are not to confound with the troops of this kind the Switzers, who at preſent ſerve different powers, with the permiſſion of their ſovereign, and in virtue of alliances ſubſiſting between thoſe powers and the Helvetic body, or ſome particular Canton. The latter are real auxiliaries, though paid by the ſovereigns whom they ſerve.

A great deal has been ſaid on the queſtion, whether the profeſſion of a mercenary ſoldier be lawful, or not? or whether individuals may for money, or any other reward, engage to ſerve a foreign prince in his wars? This queſtion

queſtion does not to me appear very difficult to be ſolved. They who enter into ſuch engagements, without the expreſs or tacit conſent of their ſovereigns, offend againſt their duty as ſubjects. But if their ſovereign leaves them at liberty to follow their inclination for a military life, they are abſolutely free. Now, every free man may join himſelf to whatever ſociety he pleaſes, and which to him appears moſt advantageous. He may make its cauſe his own, and eſpouſe its quarrels. He becomes in ſome meaſure, at leaſt for a time, a member of the ſtate in the ſervice in which he engages; and as an officer is commonly at liberty to quit the ſervice when he thinks proper, and the ſoldier at the term of his engagement; if therefore this ſtate embark in a war, manifeſtly unjuſt, the foreigners may quit its ſervice. And this mercenary ſoldier having now learnt the art of war, has rendered himſelf capable of ſerving his country, whenever it requires his aſſiſtance. The laſt conſideration will furniſh us with an anſwer to a queſtion propoſed on this head: Whether the ſovereign may with equity and decency permit his ſubjects to ſerve foreign powers indiſcriminately for money? He may, becauſe his ſubjects will by this means learn an art, the thorough knowledge of which is both uſeful and neceſſary. The tranquillity, the profound peace, which Switzerland has ſo long enjoyed, in the midſt of all the commotions and wars which have agitated Europe; this long repoſe, I ſay, would ſoon become fatal to it, did not the citizens, by ſerving foreign princes, qualify themſelves for the operations of war, and ſupport their martial ſpirit.

§ 14. What ſhould be obſerved in liſting ſuch.

Mercenary ſoldiers engage themſelves, and enliſt voluntarily. The ſovereign has no right to compel foreigners; he is not even to make uſe of artifice or ſurpriſe, for inducing them to engage in a contract, which, like all others, ſhould be founded on candour and probity.

As

§ 15. Of enliſting in foreign countries.

As the right of levying ſoldiers belongs ſolely to the nation (§ 7.) ſo no perſon is to enliſt ſoldiers in a foreign country, without the permiſſion of the ſovereign, and even with this permiſſion none but volunteers are to be enliſted; for the ſervice of their country is out of the queſtion here, and no ſovereign has a right to give or ſell his ſubjects to another. They who undertake to enliſt ſoldiers in a foreign country, without the ſovereign's permiſſion; and in general, whoever alienates the ſubjects of another, violates one of the moſt ſacred rights both of the prince and the ſtate. It is the crime diſtinguiſhed by the name of *Plagiat* or man-ſtealing, and accordingly is puniſhed with the utmoſt ſeverity in every political ſtate. Foreign recruiters are hanged immediately, and very juſtly, as it is not to be preſumed that their ſovereign ordered them to commit the crime; and if they did receive ſuch an order, they ought not to obey it; their ſovereign having no right to command what is contrary to the law of nature. It is not, I ſay, apprehended that theſe recruiters act by order of their ſovereign, and uſually they who have practiſed ſeduction only, are, if taken, ſeverely puniſhed. If they have uſed violence, and made their eſcape, they are claimed, and the men they carried off demanded. But if it appears that they acted by order, ſuch a proceeding in a foreign ſovereign is juſtly conſidered as an injury, and as a ſufficient cauſe for declaring war againſt him, unleſs he condeſcends to make ſuitable reparation.

§ 16. Obligation of ſoldiers.

All ſoldiers, natives or foreigners, are to take an oath to act faithfully, and not deſert the ſervice. This is no more than what they are already obliged to, the one as ſubjects, the other by their engagement; but their fidelity is of ſo great importance to the ſtate, that too many precautions cannot be taken for rendering it ſecure. Deſerters ſhould be ſeverely puniſhed, and the ſovereign, where he judges it neceſſary, may inflict capital puniſhment

ment on them. The emiſſaries who ſolicit them to deſert are far more guilty than the recruiters mentioned in the preceding ſection.

§ 17. Of military laws.

Good order and ſubordination, ſo uſeful in all places, are no where ſo neceſſary as in an army. The ſovereign ſhould exactly ſpecify and determine the functions, duties, and rights of military perſons, as ſoldiers, officers, commanders of parties, and generals. He ſhould regulate and fix the authority of commanders of all degrees, the puniſhments to be inflicted on offences, the form of trials, &c. The laws and orders relative to theſe ſeveral particulars form the military code.

§ 18. Of military diſcipline.

Theſe regulations, the particular end of which is to maintain order in the troops, and to render them capable of performing the beſt ſervice, conſtitute what is called military diſcipline. This is of the laſt importance. The Switzers were the firſt among the modern nations that revived it. It was a good diſcipline added to the bravery of a free people, that even in the infancy of the republic, produced thoſe ſignal advantages which aſtoniſhed all Europe. Machiavel, in his diſcourſe on Livy, ſays, That *the Switzers are the maſters of all Europe in the art of war.* The Pruſſians have very lately ſhewn what may be expected from a good diſcipline, and aſſiduous exerciſe: ſoldiers, collected from all quarters have, by the force of cuſtom, and the influence of command, performed all that could be expected from the moſt zealous and affectionate ſubjects.

§ 19. Of the ſubaltern powers in war.

Every military officer, from the enſign to the general, enjoys the rights and authority aſſigned him by the ſovereign; and the will of the ſovereign in this reſpect is known by his declarations of the nature of their reſpective functions, as expreſſed either in their commiſſions he confers, or the military laws, where it is inferred by former examples. For every man enjoying a poſt is preſumed to be inveſted with all the powers neceſſary

for discharging properly the several functions of his office.

Thus the commission of a commander in chief, taken simple and unlimited, gives him an absolue power over the army, the right of marching it whither he thinks proper, of undertaking such operations as he shall find conducive to the service of the state, &c. His power indeed is often limited; but the example of Marshal Turenne sufficiently shews, that when the sovereign is well assured of his having made a good choice, the best thing he can do in this respect is to give the general an unlimited power. Had the operations of the Duke of Marlborough depended on the directions of the cabinet, there is little probability that all his campaigns would have been crowned with such distinguished success.

When a governor is besieged in the place where he commands, and all communication with his sovereign cut off, that very circumstance confers on him the whole authority of the state.

These particulars merit the utmost attention, as they furnish a principle for determining what the several commanders in war may execute with a sufficient power. Besides the consequences to be drawn from the very nature of the employments, and the general customs, must be also considered here. If it be known that the officers of a particular nation, in a certain rank, have been constantly invested with such or such powers, it may reasonably be presumed that the person we are engaged with, is furnished with the same powers.

§ 20. How their promises bind the sovereign.

Whatever an inferior officer, as a commandant within his department, promises conformable to the terms of his commission, and agreeable the power he is naturally invested with by his office, and the duties committed to his care, all this, I say, is, from the reasons we have before given,

given, promiſed in the name and authority of the ſovereign, he is as fully obliged to perform it as if he had immediately promiſed it in his own perſon. Thus a commandant capitulates for his place and for his garriſon, and what he has promiſed, the ſovereign cannot invalidate. In the laſt war, the general who commanded the French at Lintz obliged himſelf to march back his troops on this ſide the Rhine. Governors of places have often promiſed that, for a limited time, their garriſons ſhould not carry arms againſt the enemy with whom they capitulated: and theſe capitulations have always been faithfully obſerved.

§ 21. In what caſes their promiſes bind only themſelves.

But if an inferior officer exceeds the authority of his poſt, his promiſe becomes no more than a private engagement. It is a *Sponſio* only, which we have already diſcuſſed [B. II. Ch. XIV.] This was the caſe of the Roman conſuls at the Furcæ Caudinæ. They might agree to deliver hoſtages, and that their army ſhould paſs under the yoke, &c. but their power did not extend to their making peace, as they took care to ſignify to the Samnites.

§ 22. Of a ſubaltern power who aſſumes an authority he has not.

If an inferior officer aſſumes an authority which it has not, and thus deceives the party treating with him, though an enemy, he is abſolutely reſponſible for the damage cauſed by his deception, and obliged to make ſatisfaction. I ſay, were it an enemy, for the faith of treaties is to be obſerved between enemies, as all perſons of virtue agree, and as we ſhall prove in the ſequel. The ſovereign of this fraudulent officer is to puniſh him, and oblige him to repair his fault. This is what the ſovereign owes to juſtice, and his own character.

§ 23. How they bind their inferiors.

Subaltern powers, by their promiſes bind thoſe who are under their orders, with regard to all things within the limits of their poſts, and whilſt they have a right to command them; for with regard to ſuch particulars, an officer acts by the authority of his ſovereign, and

which his inferiors are bound to reſpect. Thus in a capitulation the governor of a place ſtipulates and promiſes for his garriſon, and alſo for the magiſtrates and inhabitants.

CHAP. III.

Of the juſt Cauſes of War.

§ 24. That war is never to be undertaken without very ſtrong reaſons.

WHOEVER forms to himſelf the idea of war, conſiders its terrible effects, its deſtructive and unhappy conſequences, muſt agree, that it ſhould never be undertaken without the ſtrongeſt reaſons. Humanity is ſhocked at a ſovereign who without reaſon laviſhes the lives of his moſt faithful ſubjects, who expoſes his people to the havock and miſeries of war, when they might enjoy an honourable and ſalutary peace. And if this imprudence, this want of love for his people, be accompanied with injuſtice towards thoſe he attacks, what guilt does he incur, or rather what a ſeries of crimes does he commit? Beſides the misfortunes drawn on his ſubjects, for which he is accountable, he is guilty alſo of thoſe he carries amidſt an innocent people. The ſlaughter of men, the pillage of cities, the devaſtation of provinces, are his crimes. He is reſponſible to God, and accountable to man, for every perſon that is killed. The violences, the crimes, the various diſorders attendant on the licentious tumult of arms, pollute his conſcience and blacken his account, as he is the original author of them all. May this faint ſketch affect the hearts of the leaders of nations, and in military enterpriſes ſuggeſt to them a circumſpection proportional to the importance of the ſubject!

Were

§ 25. Of juſtificatory reaſons and motives for making war.

Were men always rational, they would terminate conteſts by the arms of reaſon only: natural juſtice and equity would be their rule, or their judge. Force is but a wretched expedient againſt thoſe who ſpurn at juſtice, and refuſe the remonſtrances of reaſon; but this is the ultimate method to which a nation muſt have recourſe, when every other proves ineffectual. It is only in extremities that a juſt and wiſe nation or a good prince has recourſe to it, as we have ſhewn in the laſt chapter of the ſecond book. The reaſons which may determine us to have recourſe to it are of two kinds. The one manifeſt that we have a right to make war when we have a lawful cauſe of it. Thoſe are called *juſtificatory reaſons*. The other taken from fitneſs and advantage. Theſe ſhew whether it be expedient for the ſovereign to undertake a war, and are called *motives*.

§ 26. What is in general a juſt cauſe of war.

The right of uſing force or making war, belongs to nations no farther than is neceſſary to their defence, and the ſupport of their rights (Sect. 3.) Now any one attacking a nation, or violating its perfect rights, does it an injury: from which time, and only from thence, this nation has a right to repel him, and reduce the agreſſor to reaſon. It has farther a right to prevent the injury on any appearance of it (Book II. Sect. 50.). Let us then ſay in general, that the foundation or cauſe of every juſt war is injury, either already done or threatened. The juſtificative reaſons of a war ſhew, that an injury has been received, or ſo far threatened as to authoriſe a prevention of it by arms. It is however evident, that here the queſtion regards the principal in the war, and not thoſe who join in it as auxiliaries. Therefore in judging whether a war be juſt, we muſt conſider whether he who undertakes it, has in fact received an injury, or whether he be really threatened. And to know what is to be reputed an injury, the rights, properly

properly called the *perfect rights* of the nation, ſhould be known; theſe are of many kinds, and in great number, but they may all be referred to the two general heads of which we have already treated; and ſhall conſider farther in the courſe of this work. Whatever ſtrikes at theſe rights is an injury, and a juſt cauſe of war.

§ 27. What war is unjuſt.

The immediate conſequence of the premiſſes is, that a a nation taking arms when it has received no injury, nor is threatened with any, makes an unjuſt war. That nation to which an injury has been done, or is preparing to be done, has alone a juſt cauſe for making war.

§ 28. Of the end of war.

From the ſame principle we ſhall likewiſe infer the juſt and lawful ſcope of every war, which is, to *revenge or prevent injury*. To *revenge* ſignifies here to proſecute the reparation of an injury, if it be of a nature to be repaired; or if the evil be irreparable, to obtain a juſt ſatisfaction; or, if, requiſite, to puniſh the offender, with a view of providing for our future ſafety. To all this we are authorized by the right of ſafety. (Book II. Sect. 49—52.) Therefore we may ſet down this triple end as the diſtinguiſhing characteriſtic of a lawful war. 1. To recover what belongs or is due to us. 2. To provide for our future ſafety by puniſhing the aggreſſor, or offender. 3. To defend ourſelves from an injury by repelling an unjuſt violence. The two firſt are the objects of an offenſive, the third that of a defenſive war. Camillus, when he was going to attack the Gauls, conciſely repreſented to his ſoldiers all the cauſes which can juſtify a war: *Omnia quæ defendi, repetique et ulciſci fas ſit* (*a*).

§ 29. Both juſtificative reaſons and decent motives are to concur in undertaking a war.

As nations or leaders are not only to make juſtice the rule of their conduct, but alſo to regulate it for the good

(*a*) Tit. Liv. Lib. IX. Cap. XLIX.

of

of the ſtate. So decent and commendable motives muſt concur with the juſtificative reaſons, that they ſhould undertake a war.

Theſe reaſons ſhew that a ſovereign has a right to take up arms, that he has juſt cauſe for it. The proper motives ſhew that in the preſent caſe it is proper and expedient to make uſe of his right. Theſe relate to prudence as the juſtificative reaſons belong to juſtice.

§ 30. Of decent and faulty motives.

I call decent and commendable motives thoſe derived from the good of the ſtate, from the ſafety and common advantage of the citizens. They are inſeparable from the juſtificative reaſons, a breach of juſtice being never truly advantageous. An unjuſt war may for a time enrich a nation, and enlarge its frontiers, but it thereby becomes odious to other nations, and is in danger of being oppreſſed by them. Beſides, do opulence and extent of dominion always conſtitute the happineſs of ſtates? Amidſt the multitude of inſtances which offer themſelves here, I ſhall confine myſelf to the Romans. The Roman republic ruined itſelf by its triumphs, the exceſs of its conqueſts and power. Rome, the miſtreſs of the world, when enſlaved by tyrants, and oppreſſed by a military government, had reaſon to deplore the ſucceſs of its arms, and to look back with regret on thoſe happy times, when its power did not reach beyond Italy, or even when its dominion was almoſt confined within the circuit of its walls.

The unjuſt motives are all ſuch as have no tendency to produce the good of the ſtate, which inſtead of being drawn from that pure ſource, are ſuggeſted by the violence of paſſions. Such are the arrogant deſire of command, the oſtentation of power, the thirſt of riches, the avidity of conqueſt, hatred and revenge.

§ 31. Of war when the ſubject is lawful, and the motives faulty.

The whole right of the nation, and conſequently of the ſovereign, proceeds from the good of the ſtate, and by this rule it is to be meaſured. The obligation of promoting and

and maintaining the true good of the ſociety, and of the ſtate, gives the nation the right of taking up arms againſt him who threatens, or who attacks this valuable enjoyment. But if a nation, on an injury done it, is induced to take up arms, not by the neceſſity of procuring a juſt reparation, but by an unjuſt motive, it abuſes its right. The injuſtice of the motive diſgraces its quarrel, which otherwiſe had been juſt: war is not made for the primary lawful cauſe, which the nation had to engage in it, that cauſe is now no more than the pretence. As to the ſovereign in particular, the head of the nation, what right has he to expoſe the ſafety of the ſtate, with the lives and fortunes of the citizens, to gratify his paſſions? The ſupreme power is committed to him, only for the good of the nation; and he is to exerciſe it for no other end; it is the limit preſcribed to the very leaſt of his meaſures, and ſhall he take the moſt important and the moſt dangerous from motives foreign or contrary to this great end! Yet nothing is more common than ſuch a deſtructive inverſion of views, and it is remarkable, that on this account, the judicious Polybius terms *Cauſes* (*a*) of the war, the motives on which it is undertaken, and *Pretences* (*b*) the juſtificative reaſons alledged in defence of it. Thus, ſays he, the cauſe of the war of the Greeks againſt the Perſians was the trial that had been made of their weakneſs, and Philip, or Alexander after him, took for pretences the deſire of avenging injuries, which Greece had ſo often received, and of providing for its future ſafety.

§ 32. Of the pretences.

Let us however have a better opinion of nations and their leaders; there are juſt cauſes of war, real juſtificative reaſons; and why ſhould there not be ſovereigns who ſincerely conſider them as their warrant, when they have

(*a*) αἰτίαι. Hiſtor. Lib. III. Cap. VI.
(*a*) προφάσεις.

beſides

beſides reaſonable motives for taking up arms. We ſhall therefore call pretences the reaſons alledged as juſtificative, and which have only the appearance of ſuch, and are abſolutely void even of the leaſt foundation. The name of pretences may likewiſe be given to reaſons true in themſelves, but which not being of ſufficient importance for undertaking a war, are made uſe of only to cover ambitious views, or ſome other faulty motive. Such was the complaint of the Czar Peter I. that at his paſſing through Riga, ſufficient honours had not been paid him. His other reaſon for declaring war againſt Sweden I ſhall here omit.

Pretences are at leaſt a homage which unjuſt men pay to juſtice. He who covers himſelf with them ſhews ſtill ſome remains of modeſty. He does not openly trample on what is moſt ſacred in human ſociety; he tacitly acknowledges that a flagrant injuſtice deſerves the indignation of all mankind.

§ 33. Of war undertaken merely for advantage.

Whoever undertakes a war, merely from motives of advantage, without juſtificative reaſons, acts without any right, and his war is unjuſt. He who with juſt cauſe of taking arms ſhall yet begin a war only from views of intereſt, cannot indeed he charged with injuſtice, but he betrays vicious diſpoſitions; his conduct is reprehenſible and ſullied by the badneſs of his motives. War is ſo dreadful a ſcourge that nothing leſs than manifeſt juſtice, joined to a kind of neceſſity, can authoriſe it, render it commendable, or at leaſt exempt us from blame and reproach.

§ 34. Of nations making war without reaſon and apparent motives.

Nations which are always ready to take arms on any proſpect of advantage, are lawleſs robbers; but they who ſeem to delight in the ravages of war, who ſpread it on all ſides, without any other motives than their ferocity, are monſters, unworthy the name of men. They ſhould be conſidered as the enemies of mankind, in the ſame manner as in civil ſociety. Aſſaſſins and incendiaries

ries by profeſſion, are not only guilty in reſpect of the particular victims of their violences, but likewiſe of the ſtate to which they are declared enemies. All nations have a right to join in puniſhing, ſuppreſſing, and even exterminating theſe ſavages. Such were the Germans, mentioned by Tacitus; ſuch thoſe barbarians who deſtroyed the Roman empire. Nor was it till a long time after their being converted to Chriſtianity that this ferocity wore off: ſuch have been the Turks and other Tartars, Genghiſkan, Timur-Bec, or Tamerlane, who like Attila were ſcourges of providence, and who made war only for the luſt of making it. Such are in the poliſhed ages, and among the moſt civilized nations thoſe ſuppoſed heroes, whoſe ſupreme delight is a battle, and who make war from inclination purely, without any love to their country.

§ 35. How the defenſive war is juſt or unjuſt.

A defenſive war is juſt when made againſt an unjuſt aggreſſor. This requires no proof. Self-defence againſt unjuſt violence is not only a right, but the duty of a nation, and one of its moſt ſacred duties; but if an enemy making an offenſive war has right on his ſide, force cannot juſtly be oppoſed to him, as the defence then becomes unjuſt. For the enemy makes uſe only of his right. He took up arms to procure himſelf a juſt ſatisfaction, which was denied him; and to reſiſt a perſon in the uſing his right, is a piece of injuſtice.

§ 36. How it may become juſt againſt an offenſive war, which at firſt was juſt.

All that remains to be done in ſuch a caſe is to offer the invader a juſt ſatisfaction. If he will not accept it, a nation gains this great advantage of having turned the balance of juſtice on its ſide, and his hoſtilities being rendered unjuſt, as having no longer any foundation, may very juſtly be oppoſed. The Samnites, inſtigated by the ambition of their chiefs, had ravaged the lands of the allies of Rome; when they became ſenſible of their miſbehaviour, they offered full reparation for the damages, with every reaſonable ſatisfaction: but all their ſubmiſſions could

could not appeaſe the Romans; on which Caius Pontius, general of the Samnites, ſaid to his men, "Since the Ro-"mans are abſolutely determined on the war, neceſſity "juſtifies it on our ſide; arms become juſt and ſacred to "thoſe who have no other reſource." *Juſtum eſt bellum, quibus neceſſarium; et pia arma, quibus nulla niſi in armis relinquitur ſpes* (a).

§ 37. How an offenſive war is juſt in an evident cauſe.

For in order to eſtimate the juſtice of an offenſive war, the nature of the ſubject for which a nation takes up arms muſt be firſt conſidered. A nation ſhould be thoroughly aſſured of its right before it proceeds to aſſert it in ſo terrible a manner. If therefore the matter in diſpute be evidently juſt, as the recovery of property, the uſe of aſſerting an inconteſtible right, and the obtaining a juſt ſatisfaction for a manifeſt injury, where juſtice cannot be obtained otherwiſe than by force of arms; an offenſive war is lawful. Two things therefore are neceſſary to render it juſt, firſt, a right to be aſſerted; that is, that the demand made on another nation be important and well-grounded. 2. That this reaſonable demand cannot be obtained otherwiſe than by force of arms. Neceſſity alone warrants the uſe of force. It is a dangerous and terrible reſource. Nature, the common parent of mankind, allows of it only in extremity, and when all others fail. It is doing wrong to a nation to make uſe of violence againſt it, before we know whether it be diſpoſed to do us juſtice, or to refuſe it.

They who without trying pacific meaſures, on the leaſt motive run to arms, ſufficiently ſhew that juſtificative reaſons, in their mouths, are only pretences; they eagerly ſeize the opportunity of indulging their paſſions, and of gratifying their ambition, under ſome colour of right.

§ 38. In a doubtful cauſe.

In a doubtful cauſe, when the rights are uncertain, obſcure, and litigious, all that can be reaſonably required

(a) Tit. Liv. Lib. IX. Init.

is,

is, that the queſtion be diſcuſſed. (Book II. Sect. 331.) And if it be impoſſible fully to clear it up, let the conteſt be terminated by an equitable treaty. If one of the parties ſhould reject theſe pacific meaſures of accommodation, the other is empowered to take up arms for reducing him to an agreement. And we muſt obſerve, that war does not decide the queſtion, victory only compels the vanquiſhed to ſubſcribe to a treaty for terminating the difference. It is an error, no leſs abſurd than pernicious, to ſay, that war is to decide controverſies between thoſe who, as is the caſe of nations, acknowledge no judge. It is force and prudence, rather than right, which victory uſually declares for. It would be a bad rule of deciſion, but it is an effectual way for compelling him who reſiſts the forms of juſtice; and it becomes juſt in the hands of a prince who uſes it ſeaſonably, with diſcretion, and for a lawful cauſe.

§ 39. War cannot be juſt on both ſides.

War cannot be juſt on both ſides; one claims a right, the other diſputes it; one complains of a wrong, the other denies any injury to be done. They are two perſons diſputing on the truth of a propoſition, and it is impoſſible that two contrary ſentiments ſhould be true at the ſame time.

§ 40. Sometimes reputed lawful.

It may however happen, that both the contending parties act with candor, and in a doubtful cauſe, it is ſtill uncertain which ſide is in the right. Nations then being equal and independent (Book II. Sect. 36. & Prelim. Sect. 18, 19.) ſo as not to claim a right of judgment over each other, it follows that in every caſe ſuſceptible of doubt, the arms of the two parties at war are to be accounted equally lawful, at leaſt as to external effects, and till the deciſion of the cauſe. This does not hinder other nations from judging it for themſelves, for knowing what they have to do, and aſſiſting that nation which ſhall appear to have right on its ſide; neither does this effect of the independency of the nations diſculpate the author of an unjuſt war.

war. But if he acts on the conſequence of an invincible ignorance or error, the injuſtice of his arms is not to be imputed to him.

§ 41. A war undertaken to puniſh a nation.

When an offenſive war has for its object the puniſhment of a nation, like every other war, it is to be founded on right and neceſſity. 1. On right; an injury muſt have been actually received. Injury alone being a juſt cauſe of war (Sect. 26.) the reparation of it may be lawfully proſecuted, or if by its nature it be irreparable, which is the caſe when puniſhment is to be admitted, a nation is authorized to provide for its own ſafety, and even for that of all other nations, by inflicting on the offender a penalty capable of correcting him, and ſerving as an example. 2. Neceſſity is to juſtify a war of this kind; I mean, that to be lawful, it muſt be the only way left for obtaining a juſt ſatisfaction, which implies a reaſonable ſecurity for the time to come. If this complete ſatisfaction be offered, or if it may be obtained without a war, the injury is obliterated, and the right of ſurety no longer authorizes the proſecution of revenge. (Book II. Sect. 49, 52.) The nation in fault is to ſubmit to a penalty which it has deſerved, and ſuffer it by way of ſatisfaction, yet no way obliged to give itſelf up to the diſcretion of an incenſed enemy. Therefore, when attacked, it is to make a tender of ſatisfaction, aſk what penalty is required, and if no explicit anſwer be given, or the enemy is for impoſing a diſproportionate penalty, it then acquires a right of reſiſting, and defence becomes lawful. It is alſo manifeſt that the party offended has alone a right of puniſhing independent perſons; we ſhall not here repeat what we have ſaid elſewhere (Book II. Sect. 7.) of the dangerous error, or extravagant pretence of thoſe who aſſume a right of puniſhing an independent nation for faults, which do not concern them; who extravagantly ſetting up for defenders of the cauſe of God, take on themſelves to puniſh the depravation of manners, or the

the irreligion of a people, not committed to their ſuperintendency.

§ 42. Whether the aggrandizement of a neighbouring power can authorize a war againſt him.

Here a very celebrated queſtion, and of the higheſt importance, offers itſelf. It is aſked, whether the aggrandizement of a neighbouring power by which a nation fears it may one day be oppreſſed, be a ſufficient reaſon for making war againſt it? Whether juſtice allows of taking arms for oppoſing its aggrandizement, or for weakening it, only with a view of ſecuring ourſelves from thoſe dangers, which the weak have generally too much cauſe to dread from an overgrown power. To the majority of politicians this queſtion is no problem; it is more intricate and perplexing to thoſe who to prudence would conſtantly unite juſtice.

On one hand a ſtate which increaſes its power by all the methods of good government, does no more than what is commendable; it fulfils its duties towards itſelf, without offending againſt thoſe due to others. The ſovereign, who by inheritance, by a free choice, or ſome other juſt and decent way, joins new provinces, and entire kingdoms, to his dominions, only makes uſe of his right, without injuring others. How then ſhould it be lawful to attack a ſtate which for its aggrandizement makes uſe of lawful means. Nothing leſs than an injury, or being manifeſtly threatened with it, can be a juſt ſubject for war. (Sect. 26, 27.) On the other hand, an unhappy but conſtant experience, too much ſhews that ſuperior powers ſeldom fail of moleſting their neighbours, of oppreſſing them, and when an opportunity offers, and they can do it with impunity, they ſeldom ſtick at totally ſubduing them. Europe was on the point of falling into ſervitude for want of a timely oppoſition to the growing fortune of Charles V. Is the danger to be waited for? Is the ſtorm, which might be diſperſed at its riſing, to be permitted to increaſe? Are we to allow of the aggrandizement of a neighbour, and quietly wait till he is

diſpoſed

diſpoſed to enſlave us? Will it be a time for defending ourſelves when we are deprived of the means? Prudence is a duty belonging to all men, and very particularly to the heads of nations, as charged with the ſafety of a whole people. Let us endeavour to ſolve this momentous queſtion, agreeably to the ſacred principle of the law of nature and nations. It will be ſeen that they do not lead to weak ſamples, and that it is an invariable truth, that juſtice is inſeparable from ſome policy.

§ 43. Alone, and of itſelf, it cannot give a right.

And firſt, let us obſerve that prudence, which is a neceſſary quality for ſovereigns, will never adviſe the uſe of unlawful means towards a juſt and praiſe-worthy end. Let not the ſafety of the people, that ſupreme law of the ſtate, be objected here, for this very ſafety of the people, the common ſafety of nations interdicts the uſe of means, contrary to juſtice and probity. Why are certain means unlawful? If we cloſely conſider the point, if we trace it to its firſt principles, we ſhall ſee that it is purely becauſe the introduction of them would be pernicious to human ſociety, and of ill conſequence to all nations. See particularly what we have ſaid concerning juſtice (Book II. Ch. V.). It is therefore for the intereſt and even ſafety of nations, to account it a ſacred maxim, that the end does not legitimate the means. And war being allowable only to revenge an injury received, or to avert an impending danger, (Sect. 26.) it is a ſacred principle of the law of nations, that an increaſe of power does not alone and of itſelf give any one a right to take arms for oppoſing it.

§ 44. Here the appearances of danger give this right.

No injury has been received from this power. This the queſtion ſuppoſes, therefore to authoriſe a nation's running to arms, it muſt have very ſolid grounds to believe that itſelf threatened. Now power alone does not threaten an injury: there muſt be likewiſe the will. It is very unhappy for mankind that the will of oppreſſing may

may be almoſt always ſuppoſed, where there is a power of oppreſſing with impunity. But theſe two things are not abſolutely inſeparable: and all the right which their ordinary or frequent union gives, is to take the firſt appearances for a ſufficient indication. Whenever a ſtate has given ſigns of injuſtice, rapacity, pride, ambition, or of an imperious thirſt of rule; it becomes a ſuſpicious neighbour to be guarded againſt: and at a juncture when it is on the point of receiving a formidable augmentation of power, ſecurities may be aſked, and on its making any difficulty to give them, its deſigns may be prevented by force and arms. The intereſts of nations are of a very different importance from thoſe of individuals: the ſovereign is not to be indolent or lazy in the care of them, or from nobleneſs of mind and generoſity to wave his ſuſpicions. The whole of a nation lies at ſtake when it has a neighbour powerful and ambitious. As men are under a neceſſity of regulating themſelves generally by probabilities, theſe probabilities claim their attention in proportion to the importance of the ſubject: and to make uſe of a geometrical expreſſion, their right of obviating a danger is in a compound ratio of the degree of appearance, and of the greatneſs of the evil threatened. If the queſtion be of an evil eaſily ſupportable, of a ſlender loſs, matters are not to be hurried; there is no great danger in delaying our oppoſition to it, till there is a certainty of our being threatened. But if the ſafety of the ſtate lies at ſtake, we cannot exceed in precaution and foreſight. Are we to delay the averting of our ruin till it is become inevitable? If the appearances are ſo eaſily credited, it is the fault of their neighbour, who has betrayed his ambition by ſeveral indications. If Charles the Second, King of Spain, inſtead of ſettling the ſucceſſion on the Duke of Anjou, had appointed for his heir Lewis XIV. himſelf; to have inactively ſuffered the union of the monarchy of Spain with that of France, would, according to all the rules of human

human foreſight, have been nothing leſs than to deliver up all Europe to ſervitude, or at leaſt to bring it into the moſt critical and precarious ſituation. But how? if two independent nations think fit to unite, ſo as afterwards to form one joint empire, have they not a right to it? What juſt oppoſition can be offered againſt it? I anſwer, they have a right to ſuch an union, provided it be not with views detrimental to others. Now, if each of theſe nations be abſtractly able to govern, ſupport, and defend itſelf againſt inſult and oppreſſion, it is to be reaſonably preſumed that the intention of their coaleſcence is to give law to their neighbours. And on occaſion, where it is impoſſible, or too dangerous to wait for an abſolute certainty, we may juſtly act on a reaſonable preſumption. If a ſtranger preſents his piece at me in a wood, I am not yet certain that he intends to kill me; but ſhall I, in order to be convinced of his deſign, allow him time to fire? What reaſonable caſuiſt will deny me a right of preventing him? But preſumption becomes nearly equal to a certainty, if the prince, who is on the point of riſing to an enormous power, has already manifeſted an unlimited pride and inſatiable ambition. In the preceding ſuppoſition, who could have adviſed the powers of Europe to ſuffer ſuch a formidable augmentation of the great power of Lewis XIV? Too certain of the uſe he would have made of it, they would have joined in oppoſing it, and in this their ſafety warranted them. To ſay that they ſhould have allowed him time to ſettle his dominion over Spain, to conſolidate the union of the two monarchies, and to avoid doing him wrong, they ſhould have peaceably waited till he oppreſſed them; is not this depriving men of the right of governing themſelves by the rules of prudence, of following probability? Would it not be to preclude from them the liberty of providing for their ſafety, becauſe they have not a mathematical demonſtration of its being in danger?

It would have been in vain to preach ſuch doctrine. The principal ſovereigns of Europe, habituated by the adminiſtration of Louvois, to dread the views and power of Lewis XIV. carried their ſuſpicions ſo far, that they would not ſuffer a prince of the houſe of France to ſit on the throne of Spain, though he had been invited to it by the nation, conformably to the will of its laſt ſovereign. However he aſcended it, notwithſtanding the efforts of all thoſe who were ſo very much afraid of his elevation, and it has ſince appeared that their policy was too ſuſpicious.

§ 45. Another caſe more evident.

It is ſtill eaſier to prove, that ſhould this formidable power betray any unjuſt and ambitious diſpoſitions by doing the leaſt injuſtice to another, every nation may avail themſelves of the occaſion, and join their forces to thoſe of the party injured, in order to reduce that ambitious power, and diſable it from ſo eaſily oppreſſing its neighbours, or keeping them in continual awe and fear. For an injury gives a nation a right to provide for its future ſafety, by taking away from the violater the means of oppreſſion. It is lawful and even praiſe-worthy to aſſiſt thoſe who are oppreſſed, or unjuſtly attacked.

This, I hope, will ſilence the politicians, and leave them no juſt cauſe to fear that the exact obſervance of juſtice leads to inſult and ſlavery. Perhaps there is not an inſtance of a ſtate's receiving any remarkable increment of power, without giving others juſt cauſe of complaint. If all the nations intereſted are watchful and alert in oppoſing it, they will have nothing to fear. The Emperor Charles V. in order to reduce the princes of the empire under his authority, laid hold of the pretence of religion, and if by making a right uſe of his victory over the Elector of Saxony, he had accompliſhed this vaſt deſign, the liberties of Europe would have been endangered. It was therefore with very good reaſon, that France aſſiſted the proteſtants of

of Germany, for beſides the calls of its own ſafety, juſtice warranted the procedure. When the ſame prince ſeized on the Dutchy of Milan, it became the powers of Europe to aſſiſt France in diſputing it with him, and to take advantage of the opportunity for curtailing his power. Had they prudently availed themſelves of the juſt cauſes, which he ſoon gave them to form a league againſt him, it would have ſaved themſelves the ſubſequent anxieties for their tottering liberty.

§ 46. Other allowable means of defence againſt a formidable power.

But ſuppoſing that this powerful ſtate obſerves an unexceptionable juſtice and circumſpection, are its progreſſes to be looked on with an eye of indifference? And ſhall the nations, as tranquil ſpectators of the rapid augmentations of its power, imprudently give themſelves up to ſuch deſigns as incidents may inſpire? Doubtleſs no. In a matter of ſo great importance, ſupineneſs would be unpardonable. The example of the Romans is a good leſſon for all princes. Had the moſt powerful ſtates of theſe times confederated together for keeping a watchful eye on the enterpriſes of Rome, and checking its encroachments, they would not ſucceſſively have fallen into ſervitude. But force of arms is not the only expedient by which we may guard againſt a formidable power. There are others more mild and tranquil, ſuch as are always lawful: the moſt effectual is a confederacy of other ſovereigns leſs powerful, the junction of whoſe forces is a balance againſt the power which gives them umbrage. If they are firm and faithful in their alliance, their union will prove the ſafety of each.

They may alſo mutually favour each other, excluſively of him whom they fear, and by allowing various advantages to the ſubjects of allies, eſpecially in trade, and denying them to thoſe of that dangerous power, they will augment their own ſtrength, and diminiſh that of the latter, without its having any cauſe of complaint; every

one being at liberty to diſpoſe of their favours and indulgences.

§ 47. Of political equilibrium.

Europe forms a political ſyſtem, a body, where the whole is connected by the relations and different intereſts of nations inhabiting this part of the world. It is not as anciently, a confuſed heap of detached pieces, each of which thought itſelf very little concerned in the fate of others, and ſeldom regarded things which did immediately relate to it. The continual attention of ſovereigns to what is on the carpet, the conſtant reſidence of miniſters, and the perpetual negotiations make Europe a kind of a republic, the members of which, though independent, unite through the ties of common intereſt, for the maintenance of order and liberty. Hence aroſe that famous ſcheme of the political equilibrium or balance of power; by which is underſtood ſuch a diſpoſition of things, as no power is able abſolutely to predominate, or to preſcribe laws to others.

§ 48. Ways of maintaining it.

The ſureſt means for conſerving this equilibrium would be, that no power ſhould be much ſuperior to the others, that all, or at leaſt the greater part, ſhould be nearly equal in force. This project is attributed to Henry IV. but there was no executing it without injuſtice and violence. Beſides, had equality been eſtabliſhed, how could it always be ſupported by lawful means? Commerce, induſtry, military virtues, would ſoon put an end to it. The right of inheriting ſovereignties, even in favour of women and their deſcendants, ſo abſurdly ſettled, yet if ſettled, would overthrow this ſyſtem. It is more natural, eaſy, and juſt to have recourſe to the means juſt mentioned, of forming confederacies for making head againſt the moſt powerful, and hindering him from dictating law.

This is now obſerved by the ſovereigns of Europe. They conſider the two principal powers, which on that very account are naturally rivals, as deſtined to be checks on

on each other, and unite with the weakeſt, like ſo many weights thrown into the lighteſt ſcale, for keeping one in equilibrium with the other. The houſe of Auſtria has long been the preponderating power, and at preſent France is ſo in her turn. England, the opulence and fleets of which have a very great influence, without alarming any ſtate with regard to its liberty, becauſe this power ſeems cured of the ſpirit of conqueſt: England, I ſay, has the glory of holding this political balance. It is watchful to keep it in equilibrium, which is really a very juſt and wiſe policy, and will ever be highly valuable, whilſt the means it makes uſe of are only alliances, confederacies, and others equally lawful.

§ 49. How he who breaks the equilibrium, may be reſtrained, or even weakened.

Confederacies would be a ſure way of preſerving the equilibrium, and ſupporting the liberty of nations, did all princes thoroughly underſtand their true intereſts, and regulate all their ſteps for the good of the ſtate. But great powers are too ſucceſsful in gaining over partizans and allies, who blindly ſurrender themſelves to their view. Dazzled by the luſtre of a preſent advantage, ſeduced by their avarice, deceived by wicked miniſters, how many princes become the tools of a power, which one day may ſwallow up either themſelves or their ſucceſſors? Thus the ſafeſt way, when a favourable opportunity offers, and it can be done with juſtice, is to weaken him who infringes upon the equilibrium; and by every honeſt method hinder his acquiring too formidable a degree of power. For this purpoſe, the intereſted nations ſhould be eſpecially attentive not to ſuffer him to aggrandize himſelf by arms, and this they may always do with juſtice. For if this prince makes an unjuſt war, every one has a right to ſuccour the oppreſſed. If he makes a juſt war, neutral nations may interfere as mediators for an accommodation, induce the weaker ſide to offer a juſt ſatisfaction with reaſonable terms, and not permit it to fall under the weight of the conqueror. On the

the offer of equitable conditions to the prince who makes even the moſt juſt war, he has all that he can demand. The juſtice of his cauſe, as we ſhall ſoon ſee, never gives him a right of abſolutely ſubduing his enemy, unleſs when this extremity becomes neceſſary to his ſafety, or in the want of any other means of indemnifying him for the injury he has received. Now, this is not the caſe here, as the interpoſing nations can in another manner procure him a juſt ſatisfaction, and aſſurance of ſafety.

In fine, ſhould this formidable power plainly entertain deſigns of oppreſſion and conqueſt, ſhould it betray its views by preparatives or other motions, the neighbouring nations have an unqueſtionable right to prevent it. And if the fate of war declares on their ſide, a farther right to make uſe of this happy opportunity for weakening and reducing a power too contrary to the equilibrium, and dangerous to the common liberty.

This right of nations is ſtill more evident againſt a ſovereign, who from a precipitate order of running to arms without reaſons, or even ſo much as plauſible pretences, is continually diſturbing the public tranquillity.

§ 50. Behaviour allowable towards a neighbour preparing for war.

This leads us to a particular queſtion nearly allied to the former. When a neighbour in the midſt of a profound peace builds fortreſſes on our frontier, equips a fleet, augments his troops, aſſembles a powerful army, fills his magazines; in a word, when he makes preparations for war; are we allowed to attack him for preventing the danger with which we really think ourſelves threatened? The anſwer greatly depends on the manners and temper of this neighbour. The reaſons of theſe preparations muſt be aſked; and he obliged to explain himſelf. This is the way of proceeding in Europe; and if his ſincerity and good faith be juſtly ſuſpected, ſecurities may be required of him, and his refuſal would be a ſufficient indication of ill deſigns, and a juſt reaſon for preventing them; but if this ſovereign has never given any ſigns of baſeneſs and perfidy,

perfidy, and eſpecially if at that time there is no diſpute ſubſiſting between him and us, why ſhould we not quietly reſt on his word, only taking the precaution, which prudence renders indiſpenſable? We are not without reaſon to think him capable of bringing ſuch infamy on himſelf, as to add perfidy to violence. Whilſt he has not rendered his faith ſuſpicious, we have no right to require any other ſecurity from him.

However, if a ſovereign continues to keep up an extraordinary force in profound peace, his neighbours cannot entirely rely on his word: prudence requires that they ſhould keep themſelves on their guard; and however certain they may be of the good faith of a prince, unforeſeen differences may intervene; and ſhall they leave him the advantage of being provided at that juncture with a numerous and well diſciplined army; while they themſelves can have only new levies to oppoſe it? Unqueſtionably, no. This would be almoſt to give themſelves up to his diſcretion. They are then under the neceſſity of following his example, and maintaining a large army; and what a burden is this to a ſtate? Formerly, and without going any farther back than the laſt century, it was a general article in treaties of peace, that all parties ſhould diſband their troops. If in full peace a prince was for maintaining any conſiderable number of forces, his neighbours concerted meaſures, formed leagues againſt him, and obliged him to deſiſt from his military proceedings, and reduce his forces to the number ſtipulated. A moſt ſalutary cuſtom though for ſome time paſt unhappily fallen into neglect. The keeping up of numerous armies at all times is deſtructive of agriculture, puts a ſtop to population, and muſt neceſſarily deſtroy the liberty of thoſe people by whom they are maintained. Happy England! whoſe ſituation exempts it from any conſiderable charge in keeping of the inſtruments of deſpotiſm. Happy Switzerland! while

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by continuing carefully to exerciſe the militia, it keeps itſelf in a condition to repel any foreign enemies, and does not maintain in idleneſs ſoldiers, who may one day overthrow the public liberty, and even bid defiance to the lawful authority of the ſovereign. Of this the Roman legions were a ſignal inſtance. This happy method of a free republic, the cuſtom of training up all the citizens to the art of war, renders the ſtate reſpectable abroad, and ſaves it from a very pernicious defect at home. It would not have failed of being every where imitated, had the public good been every where the only view. Thus have we laid down the general principles for eſtimating the juſtice of a war. They who are thoroughly acquainted with the principles, and have juſt ideas of the rights of nations, will eaſily apply the rules to particular caſes.

CHAP. IV.

Of the Declaration of War, and of War in Form.

§ 51. Declaration of war. Neceſſity thereof.

THE right of making war belongs to nations only as a remedy againſt injuſtice: it ariſes from an unhappy neceſſity. This remedy is ſo dreadful in its effects, ſo deſtructive to mankind, ſo full of trouble to the ſtate making uſe of it, that unqueſtionably the law of nature allows of it only at the utmoſt extremity; that is, when it appears that juſtice cannot take place by any other expedient. It is demonſtrated in the foregoing chapter, that to take arms lawfully, 1. That we have a juſt cauſe of complaint. 2. That a reaſonable ſatisfaction has been denied us. 3. When the head of a nation, as we have obſerved, has maturely conſidered whether it be for the good of the ſtate to proſecute his right by force of arms. But theſe are not ſufficient; as it is poſſible that the preſent

ſent fear of our arms may make an impreſſion on the mind of an adverſary, and induce him to do us juſtice. We owe this farther regard to humanity, and eſpecially to the lives and tranquillity of the ſubjects, to declare to this unjuſt nation, or its chief, that we at length are going to have recourſe to the laſt remedy, and make uſe of open force, for bringing him to reaſon. This is called *declaring war*. All this is included in the Roman manner of proceeding, regulated in their *Fecial* law. They firſt ſent the chief of the Feciales or heralds, called *Pater Patratus*, to demand ſatisfaction of the people which had offended them; and if within the ſpace of thirty-three days this people did not return a ſatisfactory anſwer, the herald called the gods to be witneſſes of the wrong, and came away ſaying, that the Romans would conſider what they had to do. The king, and afterwards the conſul, uſed to aſk the ſenate's opinion, and the war being reſolved on, the herald was ſent back to the frontier where he declared it (*a*). It is ſurpriſing to find among the Romans ſuch juſtice, ſuch moderation and wiſdom, at a time too when apparently nothing but courage and ferocity was to be expected from them. By this religious conduct, previous to its war, Rome laid the moſt ſolid foundation for its future greatneſs.

§ 52. What it is to contain.

A declaration of war being neceſſary as a farther trial for terminating the difference without the effuſion of blood, by making uſe of the principle fear, for bringing the enemy to more equitable ſentiments; it is, at the ſame time that it declares the reſolution taken of making war, to ſet forth the cauſe of that reſolution. This is at preſent the conſtant practice among the powers of Europe.

§ 53. It is ſingle or conditional.

After a fruitleſs application for juſtice, a nation may proceed to a declaration of war which is then *pure* and *ſimple*.

(*a*) Tit. Liv. Lib. 1. Cap. XXXI.

ſimple. But if it be thought proper to avoid making it at two ſeveral times, the demand of ſatisfaction, which the Romans call *rerum repetitio*, may be accompanied by a *conditional declaration* of war, notifying that if juſtice be not done without delay, an immediate war will be the conſequence. And then there is no need of a *pure* and *ſimple* declaration of war, the *conditional* ſufficing, if the enemy delays giving ſatisfaction.

§ 54. The right of war ceaſes by the offer of equitable conditions.

If the enemy on either declaration offers equitable conditions of peace, the war is to be ſuſpended, for whenever juſtice is done, all right of employing force is ſuperſeded. The uſe being permitted only for the neceſſary ſupport of right. To theſe offers, however, are to be added ſecurities; for we are under no obligation to ſuffer ourſelves to be amuſed by empty propoſals. The word of a ſovereign is a ſufficient ſecurity, whilſt he has not diſgraced his credit by any act of perfidy. And we ſhould be contended with it. As to the conditions in themſelves, beſides the eſſential ſubject, a reimburſement of the expences may likewiſe be demanded in regard to the preparatives.

§ 55. Formalities of a declaration of war.

The declaration of war muſt be known to the ſtate againſt whom it is made. This is all which the natural law of nations requires; yet cuſtom having introduced ſome formalities, thoſe nations which by adopting the cuſtom have given a tacit conſent to the formalities, are under an obligation of obſerving them, till they have publicly renounced them. (Prelim. Sect. 26.) Formerly the powers of Europe uſed to ſend heralds or embaſſadors to declare war; at preſent this is only done in the capital, the principal towns, or on the frontiers. Manifeſtos are iſſued, and the communication, ſo eaſy and expeditious ſince the eſtabliſhment of poſts, ſoon ſpreads the intelligence.

§ 56. Other reaſons for the neceſſity of its publication.

Beſides the foregoing reaſons, it is neceſſary for a nation to publiſh the declaration of war for the inſtruction and direction

direction of its own ſubjects, in order to fix the date of the rights belonging to them from the moment of this declaration, and relatively to certain effects which the voluntary law of nations attributes to a war in form. Without ſuch a public declaration of war, it would be difficult to ſettle in a treaty of peace, thoſe acts which are to be accounted the effects of the war, and thoſe which each nation may conſider as wrongs, for obtaining reparation. In the laſt treaty of Aix la Chapelle, between France and Spain on one ſide, and England on the other, it was agreed, that all the prizes taken before the declaration of war ſhould be reſtored.

§ 57. Defenſive war requires no declaration.

He who is attacked and makes only a defenſive war, need not declare it, the ſtate of war being ſufficiently determined by the declaration of the enemy, or his open hoſtilities. Yet, whether from dignity, or for the direction of his ſubjects, a ſovereign though attacked at preſent, ſeldom fails of declaring war in his turn.

§ 58. When it may be omitted in an offenſive war.

If a nation againſt whom a war has been reſolved on, will not admit any miniſter or herald to declare it, whatever the cuſtom otherwiſe be, it is ſufficient for the other nation to declare it within its own territories, or on the frontier, and if the declaration does not come to its knowledge before hoſtilities are commenced, the former can only blame itſelf. The Turks confine and even abuſe the very embaſſadors of the powers with whom they are determined to break; a herald going to declare war againſt them in their own country, would run the hazard of his life. Their ſavageneſs diſpenſes with this formality.

§ 59. It is not to be omitted by way of repriſals.

But no perſon being exempted from his duty, only becauſe another has been wanting in *his*, we are not to omit declaring war againſt a nation before beginning hoſtilities, becauſe this nation had on another occaſion attacked us without any declaration. That nation in ſo doing has violated

violated the law of nature (Sect. 51.) and its fault is no warrant for us to be guilty of the like.

§ 60. Of the time of the declaration.

The law of nations does not impose the obligation of declaring war, for giving the enemy time to prepare itself for an unjust defence. The declaration need not be made till the army has reached the frontiers; it is even lawful to delay it till we have entered the enemies territories, and occupied an advantageous station; yet it must always precede the commission of any hostility. For thus we provide for our own safety, and equally procure the end of the declaration of war, which is, that an unjust adversary may still seriously consider his measure, and avoid the horrors of war, by doing justice. This was the conduct of that generous prince Henry IV. towards Charles Emanuel Duke of Savoy, who had wearied his patience by vain and fraudulent negotiations (*a*).

§ 61. Duty of the inhabitants on a foreign army's entering a country before a declaration of war.

If he who enters a country with an army kept in strict discipline, declares to the inhabitants, that he does not come as an enemy, that he will commit no violence, and will acquaint the sovereign with the cause of his coming, the inhabitants are not to attack him; and should they offer at any such thing, he has a right to chastise them. But he is not to be admitted into any fortresses, nor can he properly demand entrance. It is not the business of subjects to begin hostilities without the sovereign's orders; but, if brave and loyal, they will in the mean time seize on all the advantageous posts, and defend themselves against any attempt made to dislodge them.

§ 62. Beginning of hostilities.

The sovereign thus entered a country, having declared war, if equitable conditions are not offered him without delay, he may proceed to operations; for, I repeat it, we are under no obligation of suffering ourselves to be amused. But, at the same time, we are never to lose sight of the principles before laid down (Sect. 26, 51.) concerning the only legitimate causes of war. To march an army into a

(*a*) See Sully's Memoirs.

neighbouring

neighbouring country, without any menance on its part, without having tried to obtain, by reaſon and juſtice, an equitable reparation for wrongs pretended to have been received; would be introducing a very deſtructive method, ſhocking to humanity; it would be at once to overthrow the foundations of the ſafety and tranquillity of ſtates. If this manner of proceeding be not exploded and proſcribed by the public indignation and the concurrence of civilized nations, nothing is left but to be always in a military poſture, and to keep ourſelves on our guard, no leſs in the time of a profound peace than of a declared war.

§ 63. Behaviour towards ſubjects of an enemy, in a country at the time of the declaration of war.

The ſovereign declaring war can neither detain thoſe ſubjects of the enemy who are within his dominions at the time of the declaration, nor their effects. They came into his country on the public faith. By permitting them to enter his territories, and continue there, he tacitly promiſed them liberty and ſecurity for their return. He is therefore to allow them a reaſonable time for withdrawing with their effects, and if they ſtay beyond the term preſcribed, he has a right to treat them as enemies; tho' as enemies diſarmed. But if they are detained by an inſurmountable impediment, as by ſickneſs, then of neceſſity and for the ſame reaſons, a longer time is to be granted them: at preſent, ſo far from being wanting in this duty, humanity is ſtill carried farther, and very often the ſubjects of a ſtate againſt which war is declared, are allowed all the time for ſettling their affairs that can in reaſon be required. This is obſerved in a particular manner with regard to mercantile perſons, and care is taken to make proviſion for this branch, in treaties of commerce. The King of England has done more than this. His laſt declaration of war againſt France has theſe remarkable words:

"And whereas there are remaining in our kingdom, "divers of the ſubjects of the French King, we do hereby "declare

"declare our royal intention to be, that all the French "ſubjects, who ſhall demean themſelves dutifully towards "us, ſhall be ſafe in their perſons and effects."

§ 64. Publication of the war, and manifeſtos.

We have ſaid (Sect. 56.) that a ſovereign is to make the declaration of the war public within his dominions, for the inſtruction and direction of his ſubjects. He is alſo to make known his declaration of war to the neutral powers, for acquainting them with the juſtificative reaſons which warrant him, and the cauſe which obliges him to take arms, and for notifying to them that ſuch or ſuch a people is his enemy, that they may conduct themſelves conformable to his advice. We ſhall even ſee that this is neceſſary to obviate all difficulty, when we come to treat of the right of ſeizing certain things, which neutral perſons are carrying to the enemy, and what in time of war is called *contraband*. This *publication* of the war may be called *declaration*, and that which is notified directly to the enemy, *denunciation*; and indeed the Latin term is *denunciatio belli*. War is at preſent publiſhed and declared by manifeſtos. Theſe pieces never fail of containing the juſtificative reaſons, good or bad, for proceeding to the extremity of taking up arms. The leaſt ſcrupulous ſovereign would be thought juſt, equitable, and a lover of peace; he is ſenſible that a contrary reputation might be detrimental to him. The manifeſto implying a declaration of war, or the declaration itſelf, which is publiſhed all over the ſtate, contains alſo the general orders to his ſubjects relative to their conduct in the war.

§ 65. Decency and moderation to be obſerved in the manifeſtos.

In ſo civilized an age, it may be unneceſſary to obſerve that in theſe pieces, publiſhed on account of a war, all opprobrious words are to be avoided, together with every expreſſion indicating hatred, animoſity, and rage; as theſe can only excite the like ſentiments in the enemy. A prince both in his diſcourſe and in his writings is to obſerve

ſerve the moſt noble decency. He is to reſpect himſelf in the perſon of his equals: and though it is his misfortune to be at variance with a nation, ſhall he inflame the quarrel by offenſive expreſſions, and thus deprive himſelf of the hopes of a ſincere reconciliation? Homer's heroes call each other dog and drunkard, and in their wars they obſerve no manner of decorum; they were filled with the moſt brutal outrages. Frederick Barbaroſſa, with other emperors, and the popes their enemies treated each other with the ſame roughneſs and violence. Let us congratulate our age on the ſuperior gentleneſs of its manners, and not decry, as an empty politeneſs, cuſtoms which have conſequences truly ſubſtantial.

§ 66. When war is to be termed lawful, and in form.

Theſe formalities, the neceſſity of which is deducible from the principles and the very nature of war, are the characteriſtics of a lawful war, and made in form, *(juſtum bellum)*. Grotius (*a*) ſays, that according to the law of nations, two things are required to make a war ſolemn, or in due form. 1ſt, That on both ſides it ſhould be by authority of the ſovereign. 2dly, That it ſhould be accompanied with certain formalities. Theſe formalities conſiſt in the demand of a juſt ſatisfaction, *(rerum repetitio)* and in the declaration of war at leaſt on the part of him who attacks, defenſive war requiring no declaration, (Sect. 57.) nor even on urgent occaſions, ſo much as an expreſs order from the ſovereign. In effect theſe two conditions are neceſſary to make a war lawful, according to the law of nations, that is, ſuch as nations have a right of making. The right of making war belongs only to the ſovereign (Sect. 4.) and he has a right of taking arms only when refuſed juſt ſatisfaction, (Sect. 37.) and even then not till after having declared war. (Sect. 51.) A war in form is alſo called a regular war, certain rules, either pre-

(*a*) De jure Belli et pacis, Lib. I. Cap. III. Sect. 4.

ſcribed

ſcribed by the law of nature, or adopted by cuſtom, being obſerved in it.

§ 67. **Is to be diſtinguiſhed from a war without form.**

A war lawful and in form, is carefully to be diſtinguiſhed from an unlawful war, entered on without any form, or rather from thoſe incurſions which are committed either without lawful authority, or apparent cauſe, as likewiſe without formalities, and only for havock and pillage. Grotius, Book III. Chap. III. relates ſeveral inſtances of the latter. Such were the wars of the *Grandes Compagnies*, which had aſſembled in France, during the wars with the Engliſh; armies of banditti, which ranged about Europe, purely for ſpoil and plunder; ſuch were the Cruiſes of the Flibuſtiers without commiſſion, and in time of peace; and ſuch in general are the depredations of Pirates. To the ſame claſs belong almoſt all the expeditions of the African Corſairs, though authorized by a ſovereign, they being founded on no apparent juſt cauſe, and whoſe only motive is the avidity of captures. I ſay, theſe two ſorts of wars, lawful and unlawful, are to be carefully diſtinguiſhed, their effects, and the rights ariſing from them being very different.

§ 68. **Grounds of this diſtinction.**

In order to perceive rightly of the foundation of this diſtinction, it is neceſſary to recollect the nature and ſcope of a lawful war, it is only as the laſt remedy againſt obſtinate injuſtice, that the law of nature allows of war. Hence ariſe the rights which it gives, as we ſhall explain in the ſequel: hence likewiſe the rules to be obſerved in it. And it being equally poſſible that one or other of the parties may have right on his ſide, and that on the account of the independency of nations, this is not to be decided. (Sect. 40.) The condition of the two enemies is the ſame, while the war laſts. Thus when a nation or a ſovereign has declared war againſt another ſovereign by reaſon of a difference ariſing between them, their war is what among nations is called a lawful war, and in form; and

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as we ſhall more particularly ſhew (*a*) the effects by the voluntary law of nations, are the ſame on both ſides, independently of the juſtice of the cauſe. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without ſo much as an apparent cauſe. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by ſuch ſort of enemies is not under any obligation to obſerve towards them the rules of wars in form. It may treat them as robbers. The city of Geneva, after defeating the attempt of the famous Eſcalade (*b*) hung up the Savoyards, whom they had made priſoners, as robbers who had attacked them without any cauſe, or declaration of war. Nobody offered to cenſure this proceeding, which would have been deteſted in a formal war.

CHAP. V.

Of the Enemy, and Things belonging to the Enemy.

§ 69. Who is an enemy.

THE enemy is he with whom a nation is at open war. The Latins had a particular term (*Hoſtis*) to denote a public enemy, as diſtinguiſhing it from a private enemy, (*Inimicus.*) Our language affords but one word for theſe two claſſes of perſons, which yet are to be carefully diſtinguiſhed. A private enemy is one who ſeeks to hurt us, and takes pleaſure in it. A public enemy forms claims againſt us, or rejects ours, and maintains his real or pretended rights by force of arms. The former is never innocent; he nouriſhes rancour and hatred in his heart.

(*a*) Chap. XII.
(*b*) In the year 1602.

It is poſſible that the public enemy may be free from ſuch odious ſentiments, that he does not deſire our hurt, and is only for maintaining his rights. This is a neceſſary obſervation for regulating the diſpoſitions of our heart towards a public enemy.

§ 70. All the ſubjects of the two ſtates at war are enemies.

When the head of a ſtate or ſovereign declares war againſt another ſovereign, it implies that the whole nation declares war againſt the other (Book I. Sect. 40, 41.) as the ſovereign repreſents the nation, and acts for the whole ſociety. And the nations are concerned with each other reſpectively, only as bodies, in their quality as nations. Thus theſe two nations are enemies, and all the ſubjects of the one are enemies to all the ſubjects of the other incluſively. Herein cuſtom agrees with the principles.

§ 71. Enemies continue ſuch in all places.

Enemies continue ſuch, where they happen to be. The place of abode is of no account here. It is the political ties which determine the quality. Whilſt a man remains a citizen of his own country, he remains the enemy of all thoſe with whom a nation is at war; but we are not to conclude from this, that theſe enemies may treat each other as ſuch, wherever they happen to meet; every one being maſter in his reſpective country, a neutral prince will not allow them to uſe any violence in his territories.

§ 72. Whether women and children are to be accounted enemies.

Women and children, being ſubjects of the ſtate, and members of the nation, they are to be reckoned among enemies; but this does not import that it is lawful to uſe them as men who carry arms, or are able to carry them. It will be ſeen that the ſame rites are not allowable againſt every kind of enemies.

§ 73. Of things belonging to the enemy.

After preciſely determining who are enemies, it is eaſy to know what are the things belonging to the enemy, (*res hoſtiles.*) We have ſhewn that not only the ſovereign with whom we are at war is an enemy, but alſo his whole nation, even to the very women and children, whatever belongs

belongs to this ſtate, to the ſovereign, to the ſubjects of any age or ſex, all theſe I ſay, may be called things belonging to the enemy.

§ 74. Continue ſuch every where.

And it is here alſo as with perſons; things belonging to the enemy continue ſuch wherever they are. Whence, no more than with regard to perſons (Sect. 71.) it is not to be inferred, that we have a right every where of treating them as things belonging to the enemy.

§ 75. Of neutral things found with an enemy.

Since it is not the place where a thing is, which determines the nature of that thing, but the quality of the perſon to whom it belongs, things belonging to neutral perſons, which happen to be in an enemy's country, or the enemy's ſhips, are to be diſtinguiſhed from thoſe belonging to the enemy. But it is the owner that muſt clearly prove that they are his, as in default of ſuch a proof, a thing is naturally preſumed to belong to the nation with which it is found.

§ 76. Of lands poſſeſſed by foreigners in an enemy's country.

The foregoing paragraph relates to moveable goods, but the rule is different with regard to immoveables. To eſtates in land, as they all in ſome meaſure belong to the nation, are part of its domain, of its territory, and under its government (Book I. Sect. 204. 235. Book II. Sect. 114.); and the propietor being always a ſubject of the country as poſſeſſor of a parcel of land, goods of this nature do not ceaſe to be the enemy's goods *(res hoſtiles)* though poſſeſſed by a neutral ſtranger. Nevertheleſs, war being now carried on with ſo much moderation and indulgence, ſafe-guards are allowed to houſes and lands poſſeſſed by foreigners, in any enemy's country. For the ſame reaſon, he who declares war does not confiſcate the immoveable goods poſſeſſed in his country by his enemy's ſubjects. In permitting them to purchaſe and poſſeſs thoſe goods, he has in this reſpect admitted them into the number of his ſubjects. But the income may be ſequeſtrated, for hindering the remittance of it to the enemy's country.

§ 77. Of things due to the enemy by a third perſon.

Among the things belonging to the enemy are likewiſe incorporeal things, all his rights, titles, and debts, excepting however thoſe kind of rights granted by a third perſon, and in which he is ſo far concerned that it is not a matter of indifference to him, by whom they are poſſeſſed. Such, for inſtance, are the rights of commerce. But as debts are not of this number, war gives us the ſame rights over any ſum of money due by neutral nations to our enemy, as it can give over his other goods.

When Alexander, by conqueſt, became abſolute maſter of Thebes, he remitted to the Theſſalians a hundred talents which they owed to the Thebans (*a*). The ſovereign has naturally the ſame right over what his ſubjects may be indebted to enemies. Therefore he may confiſcate debts of this nature, if the term of payment happen in the time of war, or at leaſt he may prohibit his ſubjects from paying while the war laſts. But at preſent, in regard to the advantage and ſafety of commerce, all the ſovereigns of Europe have departed from this rigour. And as this cuſtom has been generally received, he who ſhould act contrary to it would injure the public faith; for ſtrangers truſted his ſubjects only from a firm perſuaſion that the general cuſtom would be obſerved. The ſtate does not ſo much as touch the ſums which it owes to the enemy. Every where, in caſe of a war, funds credited to the public are exempt from confiſcation and ſeizure.

(*a*) Grotius de jure belli & pacis. Lib. III. Cap. VIII. Sect. 4.

CHAP.

CHAP. VI.

Of the Enemy's Allies; Societies of War, Auxiliaries, and Subſidies.

§ 78. Of treaties relative to war.

WE have ſufficiently ſpoken of treaties in general, that here we ſhall touch on this ſubject only in its particular relations to war. Treaties relating to war are of ſeveral kinds, and vary in their objects and clauſes, according to the will of thoſe who make them. Beſides applying to them all that we have ſaid of treaties in general (Book II. Ch. XII. &c.) they may alſo be divided into treaties real and perſonal, equal and unequal, &c. But alſo thoſe which relates to their particular object, war, have their ſpecific differences.

§ 79. Of defenſive and offenſive alliances.

Under this relation, alliances made for war are divided in general into *defenſive* alliances and *offenſive* alliances. In the former the nation engages only to defend its ally in caſe he be attacked: in the latter a nation joins with him for attacking, and for jointly carrying the war into another nation. Some alliances are both offenſive and defenſive, and an alliance is ſeldom offenſive without being alſo defenſive. But it is very uſual for alliances to be purely defenſive: and theſe are in general the moſt natural and lawful. It would be too tedious, and even of little uſe, to go through the detail of all the variety in theſe alliances. Some are made without reſtriction towards and againſt all; in others certain ſtates are excepted: a third are formed nominally, againſt ſuch or ſuch a nation.

§ 80. Difference between ſocieties of war and treaties of ſuccour.

But a difference of great importance to be obſerved, eſpecially in defenſive alliances, is that between an intimate and complete alliance, in which we engage to make the

the cauſe common, and another in which we promiſe only a ſettled ſuccour; the alliance making a common cauſe is a *ſociety of war*. Every one acts with his whole force; all the allies become principals in the war; they have the ſame friends and the ſame enemies: but an alliance of this nature is more eſpecially termed a *ſociety of war* when it is offenſive.

§ 81. Of auxiliary troops.

When a ſovereign, without directly taking part in the war made by another ſovereign, ſends him only ſuccours of troops or ſhips; theſe are called *auxiliaries*. The *auxiliary* troops ſerve the prince to whom they are ſent, according to their ſovereign's orders. If given purely and ſimply without reſtriction they are to ſerve equally on the offenſive or defenſive; and in the conduct of the ſeveral operations they are to obey the prince to whoſe aſſiſtance they come. Yet this prince has not the free and entire diſpoſal of them, as of his own ſubjects; they are granted him only for his own wars, and he has no right to transfer them as auxiliaries to a third power.

§ 82. Of ſubſidies.

Sometimes this ſuccour of a power, which does not directly take part in the war, conſiſts in money, and then it is called *ſubſidy*. This term is now often taken in another ſenſe, and ſignifies a ſum of money paid annually from one ſovereign to another, in return for a body of troops, furniſhed for his wars or kept ready for his ſervice. The treaties for procuring ſuch a reſource are called *ſubſidy-treaties*. France and England have at preſent ſuch treaties with ſeveral of the northern powers and princes in Germany, and even in times of peace.

§ 83. When a nation is allowed to aſſiſt another.

For judging of the morality of theſe ſeveral treaties or alliances, of the lawfulneſs of them, according to the law of nations. This muſt be laid down as an inconteſtible principle: *It is lawful and commendable to ſuccour and aſſiſt, every way, a nation making a juſt war; and even this aſſiſtance is the duty of every nation, which can give it without*

without being wanting to itſelf. But he who makes an unjuſt war is not to be aſſiſted in any manner. There is nothing in this which is not demonſtrated by all that we have ſaid of the common duties of nations towards each other (Book II. Ch. I.) To ſupport right when we are able, is always commendable: but to aſſiſt an unjuſt party is to partake of his guilt, it is being no leſs unjuſt than himſelf.

§ 84. And to make alliances for war.

If to the principle we have now laid down, be added the conſideration of what a nation owes to its proper ſafety, of the care which it is ſo natural and ſo fit to take for putting ourſelves in a condition of making head againſt an enemy; we ſhall more clearly perceive the great right a nation has to make alliances for war, and eſpecially defenſive alliances, the tendency of which is only to maintain every one in the quiet and ſecure poſſeſſion of his property.

But great circumſpection is to be uſed in contracting ſuch alliances. Engagements by which a nation may be drawn into a war, when it is the fartheſt from any ſuch thoughts, are to be taken only for very important reaſons, and with a direct view to the good of the ſtate. We here ſpeak of alliances made in a profound peace, and by way of precaution againſt future incidents.

§ 85. Of alliances made with a nation whilſt at war.

If an alliance is to be contracted with a nation already engaged in a war, or juſt entering on it, two things are to be conſidered. 1. The juſtice of that nation's quarrel. 2. The good of the ſtate. If the war which the prince is making or is going to make, be unjuſt, it is not allowable to form an alliance with him; for injuſtice is not to be ſupported. Or if his war be well grounded, this conſideration ſtill remains, whether the good of the ſtate allows or adviſes to embark in his quarrel: for it is only for the good of the ſtate that the ſovereign is to uſe his authority, to this all his ſteps ſhould tend, and eſpecially the

moſt

most important. What other conſideration can authorize him to expoſe his people to the calamities of a war?

§ 86. Tacit clauſe in every alliance of war.

As it is allowable only in a juſt war to ſend ſuccours, or make alliances; ſo every alliance, every ſociety of war, every treaty of ſuccours, previouſly made in time of peace, when no particular war is intended, neceſſarily and of itſelf includes this tacit clauſe, that the treaty ſhall take place only in a juſt war. On any other footing the alliance could not be validly contracted. (Book II. Sect. 161. 168.)

But care muſt be taken that thereby treaties of alliances be not reduced to vain and illuſory formalities. The tacit reſtriction is to be underſtood only of a war evidently unjuſt; for otherwiſe a pretence of eluding treaties would never be wanting. Are you going to contract an alliance with a power actually at war, it behoves you moſt religiouſly to weigh the juſtice of his cauſe; the judgment depends ſolely on you, as you owe him no duty, any farther than the juſtice of his quarrel, and the ſuitableneſs of your circumſtances to join in it. But when once engaged, nothing leſs than the manifeſt injuſtice of his cauſe can excuſe you from aſſiſting him. In a doubtful caſe you are to preſume that your ally is well-grounded; that being his concern.

But if you have great doubts, you may meditate an accommodation. And it will be very commendable; as you may clear up the right by perceiving which of the two declines accepting equitable conditions.

§ 87. To refuſe ſuccours for an unjuſt war is no breach of alliance.

As every alliance carries with it the tacit clauſe juſt mentioned, he who refuſes ſuccour to his ally in a war, manifeſtly unjuſt, does not break the alliance.

§ 88. What the caſus fœderis is.

When alliances have thus been previouſly contracted, the caſes in which a nation is to act, in conſequence of the alliances, and in which the force of the engagements conſiſts, are on occaſion to be determined. This is what

is

is called *caſus fœderis*, or caſe of the alliance. It conſiſts in the concurrence of the circumſtances for which the treaty has been made, whether thoſe circumſtances be expreſsly ſpecified or tacitly ſuppoſed. Whatever has been promiſed in the treaty of alliance is due in the *caſus fœderis*, and not otherwiſe.

§ 89. Never takes place in an unjuſt war.

As the moſt ſolemn treaties cannot oblige perſons to favour an unjuſt quarrel (Sect. 86.) the *caſus fœderis* never takes place in a war manifeſtly unjuſt.

§ 90. How it exiſts in a defenſive war.

In a defenſive alliance the *caſus fœderis* does not exiſt immediately on our allies being attacked: we are ſtill to ſee whether he has not given his enemy a juſt cauſe for making war againſt him. For we cannot have engaged to defend him that he may be enabled to inſult others, or refuſe them juſtice. If he is in the wrong we are to uſe our endeavours with him for bringing him to offer a reaſonable ſatisfaction; and if his enemy will not be contented with it, then, and not till then, the obligation of defending him commences.

§ 91. And in a treaty of guarantee.

But if the defenſive alliance imports a guarantee of all the territories at that time poſſeſſed by the ally; the *caſus fœderis* takes place immediately on the invaſion of theſe territories, or when threatened with an invaſion. If they are attacked for a juſt cauſe, the ally muſt be induced to give ſatisfaction; but we may on good grounds oppoſe his being deprived of his poſſeſſions; as generally the guarantee of them is undertaken for our own ſecurity. Beſides the rules of interpretation, which we have given in an expreſs chapter (*a*) are to be conſulted, for determining on particular occaſions the exiſtence of the *caſus fœderis*.

§ 92. The ſuccour is not due under an inability of furniſhing it, or when the public ſafety would be expoſed.

If the ſtate, which has promiſed ſuccours, finds itſelf unable to furniſh them, its very inability is its exemption:

(*a*) Book II. Chap. XVII.

and

and if the furniſhing the ſuccours would expoſe it to an evident danger, this is alſo a lawful diſpenſation. The caſe would render the treaty pernicious to the ſtate, and therefore not obligatory. (Book II. Sect. 160.) But we here ſpeak of an imminent danger threatening the very ſafety of the ſtate; the caſe of ſuch a danger is tacitly and neceſſarily reſerved in every treaty. As to remote or ſlender dangers, they being inſeparable from every military alliance, it would be abſurd to pretend that they ſhould make an exception: and the ſovereign may riſque them in conſideration of the advantages which the nation reaps from the alliance.

In virtue of theſe principles, a nation involved in a war which requires all its forces, is diſpenſed with from ſending ſuccours to its ally. If able to face the enemy, and at the ſame time to ſend the aſſiſtance ſtipulated, no reaſon can be pleaded for ſuch diſpenſation. But, in ſuch a caſe, every one is to judge of what his ſituation and force allow. It is the ſame with other things which may have been promiſed, for inſtance proviſions. There is no obligation to furniſh an ally with them when we want them ourſelves.

§ 93. Of ſome other caſes, and that where two confederates of the ſame alliance come to a rupture.

I ſhall forbear repeating here what I have ſaid of ſeveral other caſes in diſcourſing of treaties in general, as of the preference due to the moſt antient ally (Book II. Sect. 167.) and to a protector (Sect. 204.) of the ſenſe to be given to the word allies, in a treaty where they are reſerved (Ibid. Sect. 309.). Let us only add on this laſt queſtion, that in an alliance for war made towards and againſt all, *with reſervation of allies*, this exception is to be underſtood only of the preſent allies. Otherwiſe it would afterwards be eaſy to elude the former treaty by new alliances: it would never be known what is done, or what is acquired by concluding ſuch a treaty.

A caſe which we have not ſpoken of is this: Three powers have entered into a treaty of defenſive alliance:

two

two of them quarrel, and make war on each other; what ſhall the third do? The treaty does not bind it to aſſiſt either the one or the other. For it would be abſurd to ſay that it has promiſed aſſiſtance to each againſt the other, or to one of the two in prejudice of the other. All that is incumbent on it is to employ its good offices for reconciling its allies; and if ſuch mediation fails, a liberty remains of aſſiſting that nation which ſhall appear to have juſtice on its ſide.

§ 94. Of a nation's refuſing ſuccours due in virtue of an alliance.

To refuſe an ally the ſuccours due to him, without any juſt diſpenſation, is doing him an injury. It is violating the perfect right, which we gave him by a formal engagement. I ſpeak of evident caſes, it being then only that the right is perfect; for in doubtful caſes every one is to judge what he is able to do, (Sect. 92.) but he is to judge maturely and impartially, and act with candor. And there being a natural obligation of repairing the damage cauſed by our fault, and eſpecially by our injuſtice, we are bound to indemnify an ally for all the loſſes he may have ſuſtained from our unjuſt refuſal. How much circumſpection therefore is to be uſed in engagements, by a failure in which our honour or our affairs muſt greatly ſuffer; and on the other hand the fulfilling ſuch may be attended with the moſt important conſequences.

§ 95. Of the enemy's aſſociates.

An engagement which may draw on a war is of great moment: It concerns the very ſafety of the ſtate. He who in an alliance promiſes a ſubſidy or a body of auxiliaries, ſometimes thinks that he riſques only a ſum of money, or a certain number of ſoldiers; whereas he often expoſes himſelf to war, and all its calamities. The nation againſt which he furniſhes ſuccours will look on him as their enemy, and ſhould the fate of their arms prove favourable, they will carry the war into his country. But it remains to ſee whether ſuch a thing can be done juſtly,

and

and on what occaſions. Some authors (*a*) decide in general, that whoever joins our enemy, or aſſiſts him againſt us with money, troops, or in any other manner whatever, becomes thereby our enemy, and gives us a right of making war againſt him. A cruel deciſion, and deſtructive of the tranquillity of nations! It cannot be ſupported by principles, and happily the practice of Europe is directly the reverſe.

Every aſſociate of my enemy is indeed himſelf my enemy; it matters little whether any one makes war on me directly, and in his own name, or under the auſpices of another; whatever rights war gives me againſt my principal enemy, the like it gives me againſt all his aſſociates. For theſe rights I derive from that of ſafety, from the care of my own defence; and I am equally attacked by the one and the other; but the queſtion is to know whom I may lawfully account my enemy's aſſociates, united againſt me in war.

§ 96. They who make a common cauſe are the enemy's aſſociates.

Firſt, in this number I ſhall claſs all who make a real ſociety of war with my enemy; who make a common cauſe with him, though the war be made in the name of that principal enemy. There is no need of proving this: in the ordinary and open ſocieties of war it is carried on in the name of all the allies, who are equally enemies (Sect. 80.)

§ 97. And they who aſſiſt him, without being obliged to it by treaties.

Secondly, I account aſſociates of my enemy, thoſe who aſſiſt him in his war without being obliged to it by any treaty. By this free and voluntary engagement againſt me, they make themſelves my enemies if they go no farther than furniſhing a determined ſuccour, allowing ſome troops to be raiſed, advancing money, but otherwiſe obſerve to me all the duties of friendly and neutral nations; I may conceal the ſubject of complaint, yet ſtill I have a

(*a*) See Wolfii Jus Gentium. Sect. 730. 736.

right

right to demand their reaſons. This prudence of not always coming to an open rupture with thoſe who give ſuch aſſiſtance to my enemy, that they may not join him with all their forces; this forbearance, I ſay, has gradually introduced the cuſtom of not looking on ſuch aſſiſtance as an act of hoſtility, eſpecially when it conſiſts only in the permiſſion of raiſing volunteers. How often have the Switzers granted levies to France, at the ſame time that they refuſed ſuch an indulgence to the houſe of Auſtria, though both powers were in alliance with them? How often have they allowed them to one prince, and denied them to his enemy, when in no alliance with either? They granted, or denied them, as they judged it expedient to themſelves, and they never have been attacked on ſuch account. But if prudence diſſuades us from making uſe of all our right, it does not thereby deſtroy that right. A cautious nation chuſes rather to diſſemble than unneceſſarily to encreaſe the number of its enemies.

§ 98. Or who are in a defenſive alliance with him.

Thirdly, They who being united to my enemy by an offenſive alliance, powerfully aſſiſt him in the war, which he declares againſt me; theſe, I ſay, concur in the injury intended againſt me. They ſhew themſelves my enemies, and I have a right to treat them as ſuch. And the Switzers above-mentioned in their grant of troops, uſually make it defenſive. Thoſe in the ſervice of France have always received orders from their ſovereigns not to carry arms againſt the empire, or againſt the ſtates of the houſe of Auſtria in Germany. In 1644, the captains of the Neufchattel regiments of *Guy*, on information that they were to ſerve under Marſhal Turenne in Germany, declared that they would die rather than diſobey their ſovereign, and violate the alliances of the Helvetic body. Since France has been miſtreſs of Alſatia, the Switzers, in her armies, never paſs the Rhine to attack the empire. The brave Daxelhoffer, captain of a Berne company in the French

French ſervice, conſiſting of 200 men, and of which his four ſons formed the firſt rank, ſeeing the general would oblige him to paſs the Rhine, broke his pike, and marched back with his company to Berne.

§ 99. How a defenſive alliance aſſociates with the enemy.

Even a defenſive alliance made expreſsly againſt me, or which amounts to the ſame thing, concluded with my enemy during the war, or on the certain proſpect of its declaration, is an act of aſſociation againſt me; and if followed by effects, I may look on the party contracting as my enemy. The caſe is the ſame with that of him who aſſiſts my enemy without being obliged to it, and of his own accord makes himſelf my enemy (See Sect. 97.).

§ 100. Another caſe.

The defenſive alliance, though general, and made before any appearance of the preſent war, produces alſo the ſame effect, if it imports the aſſiſtance of all the allies, for it is then a real league or ſociety of war. And therefore it would be abſurd that I ſhould be debarred from carrying the war into a nation which oppoſes me with its whole force, and ſtopping up the ſource of thoſe large ſuccours which it gives my enemy. What is an auxiliary coming to make war on me at the head of all his forces? It would be mockery to pretend not to be my enemy. What could he do more, was he openly to term himſelf ſuch? This is not out of regard to me, but to himſelf. Shall he preſerve his provinces in peace, ſecure from all danger, and yet at the ſame time do me all the miſchief in his power? No, the law of nature, the law of nations, obliges us to juſtice, but does not condemn us to be dupes.

§ 101. In what caſe it does not produce the ſame effect.

But if a defenſive alliance has not been made particularly againſt me, nor concluded at the time when I was openly preparing for war, or had already begun it, and if the allies have only ſtipulated in it, that each of them ſhall furniſh a ſtated ſuccour to him who ſhall be attacked; I cannot require that they ſhould neglect to fulfil

fulfil a ſolemn treaty, which they had an unqueſtionable right to conclude without any injury to me. The ſuccours furniſhed to my enemy are the payment of a debt; they do me no wrong in diſcharging it, and conſequently give me no juſt cauſe to make war on them (Sect. 26.). Neither can I ſay that my ſafety obliges me to attack them, for I ſhould thereby increaſe the number of my enemies, and inſtead of a ſlender ſuccour which they furniſhed againſt me, ſhould draw on myſelf all the united force of thoſe nations. Therefore it is only the auxiliaries ſent by them who are my enemies. Theſe are actually joined to my enemies, and fight againſt me. The contrary principles tend to multiply wars, and ſpread them without meaſure to the common ruin of nations. It is happy for Europe that herein agrees with the true principles. A prince ſeldom takes upon him to complain of ſuccours furniſhed for the defence of an ally, promiſed by former treaties, by treaties not made againſt him. In the laſt war the united provinces furniſhed the Queen of Hungary with ſubſidies, and even troops, and France never complained againſt theſe proceedings till thoſe troops marched into Alſatia to attack their frontiers. Switzerland, in virtue of its alliances with France, furniſhes that crown with a large body of troops, and notwithſtanding lives in peace with all Europe.

One only caſe here is exceptionable; that of defenſive war, manifeſtly unjuſt. For then there is no longer any obligation of aſſiſting an ally (Sect. 86, 87, 89.) A nation engaging in it unneceſſarily, and contrary to its duty, does an injury to the enemy, and declares againſt him out of mere wantonneſs; but this is a caſe very rarely known among nations. There are few defenſive wars without at leaſt ſome apparent reaſon for warranting their juſtice and neceſſity. Now, on any dubious occaſion, each ſtate is to judge of the juſtice of its arms, and the preſumption

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is in favour of the ally (Sect. 86.). Beſides, it belongs to you what you have to do, agreeably to your duties and to your engagements; and conſequently nothing leſs than the moſt palpable evidence can authoriſe the enemy of your ally to charge you with ſupporting an unjuſt war, contrary to your underſtanding and conſcience. In fine, the voluntary law of nations preſcribes, that in every caſe ſuſceptible of doubt, the arms of both parties, with regard to external effects, ſhall be accounted as equally lawful (Sect. 40.).

§ 102. Whether it be neceſſary to declare war againſt the enemy's aſſociates.

The real aſſociates of my enemy being my enemies, I have againſt them the ſame rights as againſt the principal enemy. (Sect. 95.) And as they declare themſelves ſuch; as they firſt take arms againſt me; I may make war on them without any declaration: it is ſufficiently declared by their own act. This is eſpecially the caſe of thoſe who in any manner whatever concur to make an offenſive war againſt me, and it is likewiſe the caſe of all thoſe whom we have mentioned in Sect. 96, 97, 98, 99. 100.

But it is not thus with thoſe nations which aſſiſt my enemy in a defenſive war; I cannot conſider them as his aſſociates. (Sect. 101.) If I am entitled to complain of their furniſhing him with ſuccours, this is a new difference between me and them, I may expoſtulate with them, and on not receiving ſatisfaction, proſecute my right, and make war on them. But in this caſe there muſt be a previous declaration (Sect 51.). The inſtance of Manlius, who made war on the Galatians for having furniſhed ſuccours to Antiochus, is not to the point. Grotius (*a*) cenſures the Roman general for beginning the war without a declaration. The Galatians in furniſhing troops for an offenſive war againſt the Romans had declared themſelves enemies to Rome. Indeed as

(*a*) Lib. III. Cap. III. Sect. 10. *de jure belli et pacis.*

a Peace

a Peace had been made with Antiochus, it ſeems as if Manlius ſhould not have fallen on the Galatians till orders came from Rome, and then if this expedition was conſidered as a freſh war, it was not only to be declared, but ſatisfaction ſhould have been aſked, before proceeding to hoſtilities. (Sect. 51.) But the finiſhing hand was not yet put to the treaty with the King of Syria, and it concerned only him, without any mention of his adherents. Therefore Manlius undertook the expedition againſt the Galatians as a conſequence or remainder of the war with Antiochus. This is what he himſelf very well obſerves in his ſpeech to the ſenate (*a*), and he even adds, that his firſt meaſure was to try whether he could bring the Galatians to reaſonable terms. Grotius more appoſitely cites the example of Ulyſſes and his companions, blaming them for attacking, without any declaration of war, the Ciconians, who during the ſiege of Troy ſent ſuccours to Priam (*b*).

CHAP. VII.

Of the Neutrality and Paſſage of Troops through a neutral Country.

§ 103. Of neutral nations.

NEUTRAL nations in a war, are thoſe who take no part in it, remaining common friends to both parties, and not favouring the arms of one to the detriment of the other. Here we are to conſider the obligations and rights flowing from neutrality.

§ 104. Conduct to be obſerved by a neutral nation.

In order rightly to underſtand this queſtion, we muſt avoid confounding what is allowable to a nation free from all engagements, with what it may do in a war, if it would be treated as perfectly neutral. A neutral nation deſirous

(*a*) Tit. Liv. Lib. XXXVIII. (*b*) Grotius ubi ſupra, Not. 3.

ſafely to enjoy the conveniences of that ſtate, is in all things to ſhew an exact impartiality between the parties at war; for ſhould he favour one to the detriment of the other, he cannot complain of being treated by him as an adherent and confederate of his enemy; his neutrality would be a fraudulent neutrality, but of which no nation would be the dupe. It is ſometimes connived at, for want of ability to reſent it; and is often permitted to avoid bringing additional forces on one's ſelf. But here we examine what may be done lawfully, and not what prudence may dictate according to the conjunctures. Let us then ſee wherein this impartiality which a neutral nation is to obſerve conſiſts.

It relates ſolely to war, and includes two articles, one not to give any ſuccours when there is no obligation, nor freely to furniſh troops, arms, ammunition, or any thing of direct uſe in war. I ſay, to give no ſuccours, and not to give equally, for that a ſtate ſhould at one and the ſame time ſuccour two ſtates, would be abſurd, as beſides it would be impoſſible to do it equally. The ſame things, the like number of troops, the like quantity of arms, of ſtores, &c. furniſhed in different circumſtances, are no longer equivalent ſuccours. 2. In whatever does not relate to war, a neutral and impartial nation muſt not refuſe to one of the parties, on account of its preſent quarrel, what it grants to the other. This does not treſpaſs on its liberty in negociations, connexions of friendſhip, its trade, or of governing itſelf by what is moſt advantageous to the ſtate. When this reaſon induces it to preferences in things of which every one has the free diſpoſal, it only makes uſe of its right, and is not chargeable with partiality.—But to refuſe any one of thoſe things to one of the parties purely as being at war with the other, and for favouring the latter, would be departing from an exact neutrality.

I have

§ 105. An ally may furnish the succour due from him, and remain neuter.

I have said that a neutral state is not to give succours to either of the parties, when *under no obligation*. This restriction is necessary, we have already seen that when a sovereign furnishes the moderate succour due in virtue of a former defensive alliance, he does not associate himself in the war. (Sect. 101.) Therefore he may fulfil his engagement, an yet observe an exact neutrality. Of this Europe affords frequent instances.

§ 106. Of the right of remaining neuter.

When a war breaks out between two nations, all others, not bound by treaties, are free to remain neuter, and the use of compulsion would be doing them an injury, being a violation of their independency in a very essential point. To themselves alone belongs the cognizance of what reasons may invite them to declare themselves; and herein they are to consider two things. 1. The justice of the cause. If it be evident, injustice is not to be countenanced. On the contrary, to succour oppressed innocence, when we are able, is amiable, is great. If the case be dubious, nations may suspend their judgment, and not engage in a foreign quarrel. 2. When convinced which side has the just cause, we are farther to consider whether it be for the good of the state to concern themselves in this affair, and to embark in the war.

§ 107. Of treaties of neutrality.

A nation making war, or preparing to make it, often proposes a treaty of neutrality to that state which it most suspects. It is prudent to know in time what is to be expected, and not run the risque of a neighbour's suddenly joining with the enemy, in the heat of the war. In every case where neutrality is allowable, it is also lawful to engage in a treaty of this nature.

Sometimes necessity renders this justifiable, however it may be the duty of all nations to assist oppressed innocence. (Book II. Sect. 4.) If an unjust conqueror, ready to fall on the property of another, offers me a neutrality when he is able to crush me, what can I do better than to accept

it? I yield to neceſſity; and my inability diſcharges me from a natural obligation. The ſame inability would even excuſe me from a perfect obligation contracted by an alliance. The enemy of my ally threatens me with a vaſt ſuperiority of force; my fate is in his hand: he requires me to give up the liberty of furniſhing any force againſt him. Neceſſity and the care of my ſafety frees me from my engagements. Thus it was that *Lewis* XIV. compelled Victor Amadeus Duke of Savoy to quit the party of the allies. But then the neceſſity muſt be very urgent. It is only poltroons or the perfidious who avail themſelves of the leaſt fear to break their promiſes, and be wanting in their duty. In the late war the King of Poland, Elector of Saxony, and the King of Sardinia, firmly held out againſt the misfortunes of events, and to their great honour, could not be brought to treat ſeparate from their allies.

§ 108. Additional reaſon for making theſe treaties.

Another reaſon renders theſe treaties of neutrality uſeful and even neceſſary; the nation which would ſecure its tranquillity amidſt the flames of war kindling in its neighbourhood, cannot take better meaſures than by concluding treaties with both parties, expreſsly agreeing with what each may do or require in virtue of the neutrality. This is the method of ſecuring peace, and preventing all chicane and altercation.

§ 109. Foundation of rules on the neutrality.

Without ſuch treaties it is to be feared diſputes will often ariſe on what neutrality does, and does not allow.—This ſubject offers many queſtions which authors have diſcuſſed with great heat, and which have given riſe to the moſt dangerous quarrels between nations: yet the law of nature and of nations has its invariable principles, and affords rules on this head, as well as on the others. Some things alſo have grown into cuſtom among civilized nations, and are to be conformed to by thoſe who would not incur the reproach of unjuſtly breaking the peace. As to the rules of the natural law of nations, they reſult from a juſt

juſt combination of the laws of war, with the liberty, the ſafety, the advantages, the trade, and the other rights of neutral nations. 'Tis on this principle that we ſhall lay down the following rules.

§ 110. How levies may be allowed, money lent, and every kind of things ſold without a breach of neutrality.

First, Whatever a nation does in a uſe of its own rights, and ſolely with a view to its own good, without partiality, without a deſign of favouring one power to the prejudice of another; cannot, I ſay, in general be conſidered as contrary to neutrality, and becomes ſuch only upon particular occaſions, when it cannot take place without injury to one of the parties, who has then a particular right to oppoſe it. Thus the beſieger has a right to prohibit acceſs to the place beſieged. (See Sect. 117. in the ſequel.) Excluſively of this kind of caſes the quarrels of another cannot deprive me of the free diſpoſal of my rights in the purſuit of meaſures which I judge advantageous to my country. Therefore when it is a cuſtom in a nation, in order for employing and exerciſing its ſubjects, to permit levies of troops in favour of a power in whom it is pleaſed to confide; the enemy of this power cannot call theſe permiſſions hoſtilities; unleſs given for invading his territories, or for the defence of a cauſe manifeſtly odious and unjuſt. He cannot even claim, with any right, that the like ſhould be granted to him; becauſe this people may have reaſons to refuſe him, which do not hold good with regard to his adverſary: and who but this nation ſhall be judge of its own conveniency. The Switzers grant levies of troops to whom they pleaſe, as we have already obſerved, and nobody hitherto has thought fit to quarrel with them on this head. However it muſt be owned, that were theſe levies conſiderable, and formed my enemy's principal ſtrength, while I, without alledging any ſolid reaſon, ſhall be abſolutely refuſed the like privilege; I ſhall be thence entitled, and with good reaſon, to look on that nation as leagued with my enemy; and in this caſe the care of my own

own ſafety would warrant my treating them as ſuch. It is the ſame in reſpect of money, which it was uſual with a nation to lend out at intereſt. If the ſovereign or his ſubjects lend money to my enemy, and refuſe it to me, becauſe they have not the ſame confidence in me; this is no breach of neutrality. They lodge their ſubſtance, where they think it ſafeſt. If ſuch preference be not founded on reaſons, I may impute it to ill-will againſt me, or to a predilection of my enemy. Yet if I ſhould make it a pretence for declaring war, both the true principles of the law of nations, and the happy cuſtom eſtabliſhed in Europe, would join in condemning me. Whilſt it appears that this nation lends out money purely for improving it by intereſt, it is at liberty to diſpoſe of it according to its own diſcretion, and I have no reaſon to complain.

But if the loan be manifeſtly for enabling the enemy to attack me; this would be concurring in the war againſt me.

Were ſuch troops furniſhed to my enemy by the ſtate itſelf, and at its expence, as alſo the money lent to him without intereſt, it would be no longer a queſtion whether ſuch ſuccour be incompatible with neutrality.

Farther it may be affirmed on the ſame principles, that if a nation trades in arms, timber, ſhips, military ſtores, &c. I cannot take it amiſs that it ſells ſuch things to my enemy, provided it does not refuſe to ſell them to me alſo. It carries on its trade without any deſign of injuring me, and in continuing it the ſame as if I was not engaged in war, that nation gives me no juſt cauſe of complaint.

§ 111. Of the trade of neutral nations with thoſe which are at war.

I here ſuppoſe that my enemy goes himſelf into a neutral country, to purchaſe what he has occaſion for. Let us now diſcuſs another point, namely, the trade, which neutral nations carry on with my enemy's country. It is certain that as they have no part in my quarrel, they are under no obligation

obligation to abandon their trade that they may avoid furniſhing my enemy with the means of making war. Should they refuſe not to ſell me any of theſe articles by taking meaſures for tranſporting great quantities of them to my enemy, with a manifeſt intention of favouring him; ſuch a partiality would exclude them from the neutrality they enjoyed. But if they only continue their cuſtomary trade, they do not thereby declare themſelves againſt my intereſt; they only exerciſe a right which they are under no obligation of ſacrificing to me.

On the other hand, whenever I am at war with a nation, both my ſafety and welfare prompt me to deprive it, as far as poſſible, of every thing which may enable it to reſiſt or hurt me. Here the law of neceſſity ſhews its force. If this law warrants me on occaſion, to ſeize what belongs to another, ſhall it not likewiſe warrant me to ſtop every thing relative to war, which neutral nations are carrying to my enemy. Even if I ſhould by taking ſuch meaſures render all theſe neutral nations my enemies, I had better run the hazard than ſuffer him who is actually at war with me, to be thus freely ſupplied to the great increaſe of his power. It is therefore very proper and very ſuitable to the law of nations, which diſapproves of multiplying the cauſes of war, not to conſider thoſe ſeizures of the goods of neutral nations as acts of hoſtility.

When I have notified to them my declaration of war againſt ſuch or ſuch a people, if they will afterwards run the riſque of ſupplying them with things relative to war, let them not complain if their goods fall into my hands; for I do not declare war againſt them becauſe they attempted to carry ſuch goods. They ſuffer indeed by a war, in which they have no concern; but it is accidentally. I do not oppoſe their right, I only make uſe of my own; and if our rights claſh with, and reciprocally injure each other,

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it flows from the effect of an inevitable neceſſity. This is a colliſion, which happens every day in war. When purſuant to my rights I exhauſt a country, from whence you drew your ſubſiſtence; when I beſiege a city with which you carried on a large trade; I doubtleſs injure you, I cauſe loſſes and inconveniences; but it is without any deſign of hurting you. I only make uſe of my rights, and conſequently do you no injuſtice.

But that limits may be ſet to theſe inconveniences, that the commerce of neutral nations may ſubſiſt in all the freedom which the laws of war will admit, there are rules to be obſerved, and on which Europe ſeems to be generally agreed.

§ 112. Of contraband goods.

The firſt is carefully to diſtinguiſh common goods which have no relation to war, from thoſe peculiarly ſubſervient to it. In the trade of the former, neutral nations are to enjoy an entire liberty; the parties at war cannot with any reaſon deny it, or hinder the importation of ſuch goods into the enemies country. In this the care of their ſafety, the neceſſity of defence, does not authoriſe them, as by theſe the enemy does not become more formidable. An attempt to moleſt or deſtroy this trade would be a breach of the rights of neutral nations, a flagrant injury to them; neceſſity, as we have juſt obſerved, being the only reaſon which can authoriſe a reſtriction of their trade and navigation to the ports of the enemy. England and the United Provinces having agreed in the treaty of Whitehall, ſigned on the 22d Auguſt 1689, to notify to all ſtates, not at war with France, that they would attack, and previouſly declared every ſhip bound to, or coming out of the harbours of that kingdom, to be a lawful prize; Sweden and Denmark, from whom ſome ſhips had been taken, entered into a counter-treaty on the 17th March 1693, for maintaining their rights and procuring juſt ſatisfaction. And the

the maritime powers perceiving that the complaints of the two crowns were well grounded, did them juſtice (*a*).

Commodities particularly uſed in war, and the importation of which to an enemy is prohibited, are called contraband goods. Such are arms, military and naval ſtores, timber, horſes, and even proviſions, in certain junctures, when there are hopes of reducing the enemy by famine.

§ 113. Whether theſe goods may be confiſcated.

But in order to hinder the carrying contraband goods to an enemy, are we only to ſtop and ſeize them, paying the coſt to the owner; or have we a right to confiſcate them? Barely to ſtop theſe goods would be generally ineffectual, eſpecially at ſea, where there is no poſſibility of cutting off entirely all acceſs to the enemy's harbours. All contraband goods therefore, on being ſeized, are confiſcated, that the fear of loſs by repreſſing the avidity of gain, may induce the merchants of neutral countries to forbear ſupplying the enemy with contraband goods. And indeed it is ſo much the concern of a nation at war, to hinder as much as poſſible the carrying any ſuch commodities to the enemy, which ſtrengthen and render him more dangerous, that neceſſity, the care of its welfare and ſafety authorize it to take effectual methods, by declaring that all commodities of that nature, deſtined for the enemy, ſhall be conſidered as lawful prize. On this account it notifies to the neutral ſtates the declaration of war (Sect. 63.) and theſe uſually give orders to their ſubjects to decline all contraband commerce with nations at war, declaring, that if they are taken in it, the ſovereign cannot protect them. In this particular the preſent cuſtoms of Europe ſeem to be generally agreed, though this did not happen till after many variations, as may be ſeen in the

(*a*) See other inſtances in Grotius, Lib. III. Ch. I. Sect. 5. Note 6. de jure belli & pacis.

note

note of Grotius, juſt cited, and particularly by the ordinances of the Kings of France, in the years 1543 and 1584, which only allow the French to ſeize contraband goods, and to keep them on paying the value. The modern cuſtom is certainly far more agreeable to the mutual duties of nations, and entirely adapted to the preſervation of their reſpective rights. The nation at war is highly concerned to deprive the enemy of all foreign aſſiſtance, and this gives it a right to conſider thoſe who carry to its enemy things neceſſary to war, if not abſolutely as enemies, yet as people who make little difficulty of hurting it, and therefore puniſhes them by the confiſcation of their goods. Should their ſovereign offer to protect them it would be equal to his furniſhing the enemy with theſe ſuccours himſelf: a meaſure doubtleſs incompatible with neutrality. A nation that without any other motive than the proſpect of gain, is employed in ſtrengthening my enemy, without regarding how far I may ſuffer (*a*), is certainly far from being my friend, and gives me a right to conſider and treat it as an aſſociate of my enemy. To avoid therefore perpetual ſubjects for complaint and rupture, it has been agreed in a manner entirely grounded on true principles, that the powers at war may ſeize and confiſcate all contraband goods, which neutral perſons ſhall attempt to carry to their enemy, without any complaint from the ſovereign of thoſe merchants; as on the other hand, the power at war does not impute to the neutral ſovereigns theſe practices of their ſubjects. Care is even taken to ſettle every particular of this kind in treaties of commerce and navigation.

(*a*) In our time the King of Spain has prohibited all Hamburgh ſhips from entering his harbours, that city having engaged to furniſh the Algerine Corſairs with military ſtores, and thus oblige it to revoke its contract with the ſtate.

Without

§ 114. Of ſearching neutral ſhips.

Without ſearching neutral ſhips at ſea, the commerce of contraband goods cannot be prevented. There is then a right of ſearching. Some powerful nations have indeed, at different times, refuſed to ſubmit to this ſearch. "After "the peace of Vervins, Queen Elizabeth continuing the "war with Spain, deſired the King of France to allow "that all French ſhips on their voyage to Spain may be "ſearched, in order to diſcover whether they did not ſe-"cretly carry military ſtores; but this was refuſed, as "an injury to trade and a favourable occaſion to pil-"lage." (*b*) At preſent a neutral ſhip refuſing to be ſearched, would from that proceeding alone be condemned as lawful prize. But to avoid inconveniences, violence, and every other irregularity, the manner of the ſearch is ſettled in the treaties of navigation and commerce. According to the preſent cuſtom credit is to be given to certificates and bills of lading, produced by the maſter of the ſhip; unleſs any fraud appear in them, or there be very good reaſon for ſuſpecting their validity.

§ 115. Effects of an enemy found in a neutral ſhip.

Effects belonging to an enemy found on board a neutral ſhip are ſeizable by the rights of war; but by the law of nature the maſter is to be paid his freight, and not to ſuffer by the ſeizure.

§ 116. Neutral effects on board the enemy's ſhips.

The effects of neutrals found in an enemy's ſhip, are to be reſtored to the owners, againſt whom there is no right of confiſcation, but without any allowance for detainder, decay, &c. The loſs ſuſtained by the neutrals on this occaſion is an accident, to which they expoſe themſelves by ſending them in an enemy's ſhip; and the captor in making uſe of the law of war, is not anſwerable for any accidents reſulting from it, no more than if a

(*b*) Grotius ubi ſupra.

neutral

neutral paſſenger, who happened unfortunately to be in an enemy's ſhip, ſhould be killed in the engagement.

§ 117. Trade with a place beſieged.

Hitherto we have conſidered the commerce of neutral nations with the territories of the enemy in general. There is a particular caſe where the rights of war extend ſtill farther. All commerce is entirely prohibited with a beſieged town. If I lay ſiege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry any thing to the beſieged, without my leave; for he oppoſes my enterprize; may contribute to the miſcarriage of it; and thus cauſe me to fall into all the evils of an unſucceſsful war. King Demetrius hung up the maſter and pilot of a veſſel carrying proviſions to Athens, when he almoſt reduced the city by famine (*a*). In the long and bloody war carried on by the United Provinces againſt Spain, for the recovery of their liberties, they refuſed the Engliſh the liberty of carrying goods to Dunkirk, before which the Dutch fleet lay (*b*).

§ 118. Impartial duties of neutrals.

A neutral nation continues with the two parties at war, in the ſeveral relations nature has placed between nations. It is ready to perform towards them both, all the duties of humanity, reciprocally due from nation to nation. It is in every thing, not directly relating to war, to give them all the aſſiſtance in its power, and of which they may ſtand in need. But this aſſiſtance is to be given with impartiality, that is, in not refuſing to one of the parties any thing on account of his being at war with the other. (Sect. 104.) This does not hinder a neutral ſtate having particular connections of friendſhip and good neighbourhood with one of the parties at war, from granting him in whatever does not relate to military tranſactions, the preference due to friends: Much more may he, without

(*a*) Plutarch in Demetrio. (*b*) Grotius ut ſupra.

giving

giving offence, continue to him, for inſtance in commerce, ſuch indulgences as have been ſtipulated in their treaties. It is therefore equally to allow, as far as the public good will permit, the ſubjects of the contending parties to viſit its territories on buſineſs, for purchaſing proviſions, horſes, and in general every thing they ſtand in need of; unleſs by a treaty of neutrality it has promiſed to refuſe to both parties ſuch commodities as are uſed in war. Amidſt all the wars which diſturb Europe, the Switzers keep their country in an unexceptionable neutrality. Every nation indiſcriminately is allowed to come thither, and purchaſe proviſions, if the country has a ſurplus, horſes, military ſtores, &c.

§ 119. Of the paſſage of troops in a neutral country.

An *innocent paſſage* is due to all nations with whom a ſtate is at peace (Book II. Sect. 123.). And this duty comprehends troops equally with individuals. But the ſovereign of the country is to judge whether this paſſage be innocent, and it is very difficult for that of an army to be entirely ſo. In the late wars of Italy, the territories of the republic of Venice, with thoſe of the Pope, ſuſtained very great damages by the paſſage of armies, and often became the theatre of the war.

§ 120. Paſſage to be aſked.

The paſſage therefore of troops, and eſpecially that of a whole army, being no matter of indifference; he who deſires to march his troops through a neutral country is to aſk the ſovereign's permiſſion. To enter his territory without his conſent, is a violation of the rights of ſovereignty and ſupreme dominion, by virtue of which this country is not to be diſpoſed of for any uſe whatever, without his permiſſion, either tacit or expreſſed. And a tacit permiſſion for the paſſage of troops is not to be preſumed, as the conſequences of ſuch a paſſage may be very detrimental.

If

§ 121. May be refused for good reasons.

If the neutral sovereign has good reasons for refusing a passage, he is not obliged to grant it; a passage in this case being no longer innocent.

§ 122. In what case it may be forced.

In all doubtful cases, the judgment of the proprietor is to be referred to concerning the innocence of the use desired to be made of things belonging to another. (Book II. Sect. 128, 130.) And his denial is to be observed, though possibly unjust. If the refusal was evidently unjust, and in the case now before us, the passage unquestionably innocent, a nation may do itself justice, and take by force what it was unjustly denied. But we have already observed that it is very difficult for the passage of an army to be absolutely innocent, and much more so for the innocence to be very evident. The evils it may occasion, the dangers that may attend it, are so various, depend on so many particulars, and are so complicated, that to foresee and provide for every thing is next to impossible. Besides, self-interest has so powerful an influence on the judgments of men, that if he who requires the passage is to judge of its innocence, he will admit no reason brought against it, and thus a door is opened to continual quarrels and hostilities. The tranquillity and common safety of nations therefore require that each should be mistress of its own territory, and at liberty to deny every foreign army an entrance, when it has not departed from its natural liberties in this respect, by treaties; and the only exception in those very rare cases is, when it may be shewn in the most evident manner, that the passage required is absolutely without danger or inconveniency. If, on such occasion, a passage be forced, he who forces it will not be so much blamed as the nation that has indiscreetly drawn this violence upon itself. Another case excepted also, is that of extreme necessity. Urgent and absolute necessity suspends all the right of property (Book II. Sect. 119. 123.). And if the proprietor be not under the same case

of

of neceſſity as you, it is allowable for you, even againſt his will, to make uſe of what belongs to him. When therefore an army muſt periſh, or never return to its own country without paſſing through neutral territories, it has a right to force a paſſage, notwithſtanding the ſovereign's denial, and to clear its way by the ſword. But it is firſt to aſk leave to paſs, to offer ſecurities, and pay whatever damages it occaſions. This was the behaviour of the Greeks on their return from Aſia, under the conduct of Ageſilaus (*a*). Extreme neceſſity may even authorize the temporary ſeizure of a place, and the putting a garriſon therein for defending itſelf againſt the enemy, or preventing him in his deſigns of ſeizing this place, when the ſovereign is not able to defend it. But when the danger is over it muſt be immediately reſtored, paying all the charges, inconveniences, and damages, cauſed by ſeizing the place.

§ 123. The fear of danger authorizes a denial.

When the paſſage is not of abſolute neceſſity, the danger alone of admitting a powerful army into one's country authorizes a denial. The commander may be diſpoſed to make himſelf maſter of it, or at leaſt may act as ſovereign, and live at diſcretion. Let it be ſaid with Grotius (*b*), that he who requires the paſſage is not to be deprived of his right for our unjuſt fears. A probable fear, founded on good reaſons, gives us a right to avoid what may render it real, and the conduct of nations affords too ſolid a foundation for the fear in queſtion. Beſides a right of paſſage is not a *perfect* right, unleſs in the caſe of an urgent neceſſity, or the moſt perfect evidence that the paſſage is innocent.

§ 124. Or to require all reaſonable ſecurities.

But in the preceding paragraph I ſuppoſe it impracticable to give ſecurity ſufficient to remove every cauſe of fearing the attempts and violence of him who demands the paſſage. If ſuch ſecurity can be given, the beſt method is to permit them to paſs in ſmall bodies only, at the

(*a*) Plutarch's life of Ageſilaus.
(*b*) Book II. Chap. II. Sect. 13. Note 5.

ſame

ſame time delivering up their arms. Inſtances of which may be found in hiſtory (*c*). The reaſon flowing from fear now no longer exiſts; therefore he who requires the paſſage ſhould conform to every reaſonable ſecurity required of him, and conſequently ſubmit to paſs by diviſions and deliver up his arms, if the paſſage is denied him on any other terms. The choice of what ſecurities he is to give does not belong to him. Hoſtages or a bond would very often be ſlender ſecurities. Of what benefit are hoſtages to me, from him who can immediately render himſelf my maſter? And of as little effect is a bond againſt a much ſuperior power.

§ 125. Whether there is always an obligation of complying with all kinds of ſecurities.

But in order to paſs through the territories of a nation, is there a conſtant neceſſity for giving every ſecurity it may require? The cauſes of the paſſage are firſt to be diſtinguiſhed, and then the manners of the nation of whom it is demanded are to be conſidered. If the paſſage be not eſſentially neceſſary, and can be obtained only on ſuſpicious or diſagreeable conditions, it muſt be laid aſide, as in the caſe of a refuſal (Sect. 122.). But if neceſſity warrants me to paſs, the conditions on which the paſſage will be granted, may be accepted or rejected, according to the manners of the people I am treating with. Suppoſe I am to croſs the country of a wild, faithleſs, and barbarous nation; ſhall I leave myſelf at its diſcretion by giving up my arms, and cauſing my troops to march in diviſions? This is ſo dangerous a ſtep that I believe none will impoſe it on me. Neceſſity authoriſes me to paſs, and even to paſs in ſuch a poſture as will ſecure me from any ambuſh or violence. I will offer every ſecurity that can be given, without weakly expoſing myſelf; and if the offer is rejected, I muſt be guided by neceſſity and prudence. I add, and

(*c*) The Eleans, and the ancient inhabitants of Cologn. See Grotius ibid.

by

by the moſt ſcrupulous moderation, that I may not treſpaſs on the right derived from neceſſity.

§ 126. Of the equality to be obſerved between both parties as to the paſſage.

If the neutral ſtate grants, or refuſes a paſſage to one of the parties at war, it is in like manner to grant or refuſe it to the other, unleſs the alteration of circumſtances gives it ſolid reaſons for acting otherwiſe. Without ſuch reaſons, to grant one what is refuſed to another, would be ſhewing partiality, and receding from an exact neutrality.

§ 127. A neutral ſtate granting a paſſage is not to be complained of.

When I have no reaſon to refuſe the paſſage, the party againſt whom it is granted has no room for complaint, much leſs for making it a pretence for a war; ſince I did no more than what the law of nations enjoins (Sect. 119.). Neither has he any right to require that I ſhould deny the paſſage; becauſe he is not to hinder me from doing what I think agreeable to my duty, and even on occaſion when I might with juſtice deny the paſſage, it is allowable in me not to make uſe of my right, eſpecially when I ſhould be obliged to ſupport my refuſal by my ſword. Who will take upon him to complain of my having permitted the war to be carried into his own country, rather than draw it on myſelf? It cannot be required that I ſhould take up arms in his favour, unleſs obliged to it by a treaty. But nations more intent on their own advantages than the obſervation of ſtrict juſtice, are often very loud on this pretended ſubject of complaint. In war eſpecially they ſtick at no meaſures; and if by their threatenings they can intimidate a neighbour to refuſe a paſſage to their enemy, they conſider this conduct as a ſtroke of policy.

§ 128. This ſtate may refuſe it from a fear of the reſentment of the oppoſite party.

A powerful ſtate will oppoſe theſe unjuſt menaces, and, firm to its juſtice and glory, will not be diverted by the fear of a groundleſs reſentment: it will not even bear the menace. But a weak nation, unable to make good its party, will be under a neceſſity of conſulting its ſafety; and this

important concern authoriſes it to refuſe a paſſage, which would expoſe it to dangers too powerful for it to repel.

§ 129. And that its country may not become the theatre of war.

Another fear may alſo warrant the refuſal, namely, that of drawing on its country the calamities of war. For ſhould even he again to whom the paſſage is granted, obſerve ſuch moderation as not to make uſe of menaces that it may be refuſed, he will alſo on his part demand the like march to meet his enemy, and thus the neutral country will become the theatre of war. The infinite evils of ſuch a ſituation are an unexceptionable reaſon for refuſing the paſſage. In all theſe caſes he who ſhould attempt to force a paſſage injures the neutral nation, and gives it the greateſt cauſe poſſible to join with the contrary party. The Switzers, in their alliances with France, have promiſed not to grant a paſſage to its enemies. They ever refuſe it to all ſovereigns at war, in order to ſecure their frontiers from this calamity. And they take care that their territory ſhall be reſpected; but make no ſcruple of granting a paſſage to recruits paſſing in ſmall bodies and without arms.

§ 130. What is contained in the grant of paſſage.

The grant of paſſage includes that of every particular connected with the paſſage of troops, and of things without which it would not be practicable: ſuch as the liberty of carrying whatever may be neceſſary to an army, that of exerciſing military diſcipline on the officers and ſoldiers, and that of buying at a reaſonable rate every thing an army may want, unleſs a fear of ſcarcity render an exception neceſſary; when the army muſt carry with them their proviſions.

§ 131. Safety of the paſſage.

He who grants the paſſage is, as far as lies in his power, to take care it be ſafe. This good faith requires; for to act otherwiſe would be drawing thoſe who are paſſing into a ſnare.

For

§ 132. No hostility to be committed in a neutral country.

For this reason, and as strangers can do nothing in a country against the sovereign's will, to attack an enemy in a neutral country, or commit in it any other hostility, is absolutely unlawful. The Dutch East-India fleet having put into Bergen in Norway, in 1666, to avoid the English, were attacked by them. But the government of Bergen fired on the assailants, and the court of Denmark complained, perhaps too faintly, of an enterprise so injurious to its rights and dignity (*a*).

To secure prisoners or spoil in a place of safety are acts of war, consequently not to be done in a neutral country; and whoever permitted it would break the neutrality, as favouring one of the parties. But I here speak of prisoners and goods, not yet perfectly in the enemy's power, the capture of which is not, if I may be allowed the expression, fully compleated. A flying party, for instance, cannot make use of a neighbouring and neutral country as a staple for securing its prisoners and spoil. To permit this would be to countenance and support its hostilities. When the capture is completed, and the booty absolutely in the enemy's power, no inquiry is made how he came by such effects, and he has a right to dispose of them any where. A privateer carries his prize into a neutral port, and there freely sells it; but he would not be allowed to put his prisoners ashore, in order to confine them; for to keep or detain prisoners of war is a continuation of hostilities.

§ 133. Not to afford retreat to troops that they may again attack their enemies.

On the other hand it is certain, that on my enemy's being defeated, and too much weakened to escape me, if my neighbour affords him a retreat, allows him time to recover, and watch a favourable opportunity of making a second attack on my territories; this conduct, so pernicious to my safety and interests, would be incompatible with

(*a*) The author of the *present state of Denmark*, written in English, pretends that the Danes had engaged to deliver up the Dutch fleet, but that some seasonable presents made to the court of Denmark saved it. Ch. X.

neutrality. If therefore my enemy on a defeat retires into a neutral country, however charity may injoin him not to refuse a paſſage and ſafety, he is to cauſe the troops, as ſoon as poſſible, to continue their march, and not permit them to watch an opportunity for attacking me. Becauſe otherwiſe he gives me a right to enter his territories in queſt of my enemy; a misfortune that too often attends nations unable to command reſpect. Their territories ſoon become the ſcene of war; armies march into it, encamp, and fight, as in a country open to all commerce.

§ 134. Conduct to be obſerved by troops paſſing through a neutral country.

Troops to whom a paſſage is granted, are not to occaſion the leaſt damage in a country; they are to keep the public roads, and not to enter the poſſeſſions of private perſons; to obſerve the moſt exact diſcipline, and punctually pay for every thing they want. And if the licentiouſneſs of the ſoldiers, or the neceſſity of ſome operations, as encamping, intrenching, and the like, have cauſed any damage, the commander or his ſovereign is to make reparation. All this requires no proof. By what right is an army to cauſe loſſes to a country, when the moſt he could aſk was an innocent paſſage?

Nothing hinders but that a ſum for damages, which it would be difficult to eſtimate, and for the inconviences naturally reſulting from the paſſage of an army, ſhould be agreed on. But it would be ſordid to ſell the very grant of paſſage, nay even unjuſt, if the paſſage be attended with no damage; ſince, in this caſe, it is due. The ſovereign, however, of the country is to take care that the damage be paid to the parties who ſuffer, for no right authoriſes him to reſerve what is given for their indemnity. Too often indeed the weak ſuſtain the loſs, and the powerful retain the compenſation.

§ 135. A paſſage may be refuſed for a war manifeſtly unjuſt.

Laſtly, as an innocent paſſage can be due only to juſt cauſes, ſo it may be well refuſed to him who requires it for

for a war manifeſtly unjuſt, as, for inſtance, to invade a country without a reaſonable pretence. Thus Julius Cæſar denied a paſſage to the Helvetians, who were quitting their country in order to conquer a better. Yet policy ſeems to have had a greater ſhare in his denial than the love of juſtice: But on this occaſion he was entitled to follow the maxims of his prudence. A ſovereign who is in a condition to refuſe without fear, ſhould doubtleſs refuſe in the caſe we now ſpeak of. But if it be dangerous, he is not obliged to expoſe himſelf for the ſecurity of another; nay to hazard raſhly the quiet and welfare of his people is abſolutely a very great breach of his duty.

CHAP. VIII.

Of the Law of Nations in War, and firſt, of what there is a Right of doing, and what is permitted in a juſt War againſt the Enemy's Perſon.

§ 136. General principle of the rights againſt an enemy in a juſt war.

WHAT we have ſaid hitherto concerns the right of making war; let us now proceed to the right, which is to take place in the war itſelf, and to the rules which nations ſhould reciprocally obſerve, even when deciding their differences by arms. We ſhall begin with the rights of the nation, which makes a juſt war, and diſcuſs what is allowed to it againſt its enemy. All theſe are to be deduced from one ſingle principle, the end of a juſt war. For when the end is lawful, he who has a right to proſecute this end is warranted in the uſe of all neceſſary means to attain it. The end of a juſt war is to *revenge or prevent injury* (Sect. 28.) that is, to procure by force the juſtice which cannot otherwiſe be obtained; to compel an unjuſt perſon to repair an injury already done, or to give ſecurities againſt any wrong threatened by him. On a declaration of war, therefore, this nation has a right of doing againſt

against the enemy whatever is necessary to this justifiable end of bringing him to reason, and obtaining justice and security from him.

§ 137. Difference between what there is a right of doing, and what is barely allowed or not punished among enemies.

The lawful end gives a true right only to those means which are necessary for obtaining such end. Whatever exceeds this is censured by the law of nature, is faulty, and will be condemned at the tribunal of conscience. Hence it is that the right to such or such acts of hostility varies according to their circumstances. What is just and perfectly innocent in a war, in one particular situation, is not always so in another. Right goes hand in hand with necessity, and the exigency of the case; but never exceeds it. It being, however, very difficult always to form a precise judgment of what the present case requires, and every nation being the judge of what its own particular situation will allow (Prelim. Sect. 16.) nations must in this particular conform to general rules. Accordingly, whenever it is certain and evident that such a measure, such an act of hostility, is necessary in general for over-powering the enemy's resistance, and attaining the end of a lawful war; this measure taken in general is accounted by the law of nations a just right in war; though he who makes use of it unnecessarily, when he might attain his end by milder methods, is not innocent before God and his conscience. On this the difference between what is just, equitable, irreprehensible in war and what is only allowed, and not punished among nations is founded. The sovereign who would preserve a pure conscience, and punctually discharge the duties of humanity, is never to lose sight of what we have already observed more than once, that nature gives him a right of making war, only in cases of necessity, when a remedy, ever disagreeable, though often necessary, must be used against obstinate injustice or violence. If he is penetrated with this great truth, he will never carry the remedy beyond its due limits, and will be very careful that

that it ſhall not fall with greater weight on mankind, and cauſe more calamity and deſolation than is requiſite for the defence of his rights and the care of his ſafety.

§ 138. Of the right to weaken the enemy by all means juſtifiable in themſelves.

The buſineſs of a juſt war being to ſuppreſs violence and injuſtice, it gives a right to compel by force, him who is deaf to the voice of juſtice. It gives a right of doing againſt the enemy whatever is neceſſary for weakening him; for diſabling him from making any farther reſiſtance in ſupport of his injuſtice; and the moſt effectual, the moſt proper methods may be choſen, provided they have nothing odious, be not unlawful in themſelves, or exploded by the law of nature.

§ 139. Of a right on the enemy's perſon.

An enemy attacking me unjuſtly, gives me an undoubted right of repelling his violences, and he who oppoſes me in arms, when I demand only my right, becomes himſelf the real aggreſſor by his unjuſt reſiſtance: he is the firſt author of the violence, and obliges me to make uſe of force for ſecuring myſelf againſt the wrongs intended me, either in my perſon or poſſeſſions. For if the effects of this force proceed ſo far as to take away his life, he owes the misfortune to himſelf; for if by ſparing him I ſhould ſubmit to the injury, the good would ſoon become the prey of the wicked. Hence the right of killing enemies in a juſt war is derived; when their reſiſtance cannot be ſuppreſſed, when they are not to be reduced, by milder methods, there is a right of taking away their life. Under the name of enemies, as we have already ſhewn, are comprehended, not only the firſt author of the war, but likewiſe all who join him, and fight for his cauſe.

§ 140. Limits of this right. An enemy not to be killed after ceaſing to reſiſt.

But the very manner by which the right of killing enemies is proved, points out alſo the limits of this right. On an enemy's ſubmitting and delivering up his arms, we cannot with juſtice take away his life. Thus in a battle quarter is to be given to thoſe who lay down their arms, and at a ſiege, a garriſon offering to capitulate are never to be refuſed

refuſed their lives. The humanity with which moſt nations in Europe carry on wars at preſent, cannot be too much commended; if ſometimes in the heat of action the ſoldier refuſes to give quarter, it is always contrary to the inclination of the officers, who eagerly interpoſe for ſaving the lives of ſuch enemies, as have laid down their arms.

§ 141. A particular caſe excepted.

There is however one caſe, where life may be denied an enemy who ſurrenders, and alſo capitulation refuſed to a place. This is when the enemy has been guilty of ſome enormous breach of the law of nations, and particularly if it be at the ſame time a violation of the laws of war. This denial of quarter is no natural conſequence of the war, but the puniſhment of his crime; a puniſhment which the injured party has a right to inflict: but for this penalty to be juſt it muſt fall on the guilty. When the war is with a ſavage nation, which obſerves no rules, and never gives quarter, it may be chaſtiſed in the perſons of any ſeized or taken, they are among the guilty, that by this rigour they may be brought to conform to the laws of humanity. But wherever ſeverity is not abſolutely neceſſary, clemency is to be uſed. Corinth was utterly deſtroyed for having violated the law of nations towards the Roman ambaſſadors. However that ſeverity has been cenſured by Cicero and other great men. He who has even the moſt juſt cauſe to puniſh a ſovereign as his enemy, will always incur the reproach of cruelty, ſhould he cauſe the puniſhment to fall on the innocent people. There are other methods of chaſtiſing the ſovereign: as the depriving him of ſome of his rights, taking from him towns, and provinces. The evil which the whole nation ſuffers then, is a participation inevitable to the members of a political ſociety.

§ 142. Of Repriſals.

This leads us to ſpeak of a kind of retortion ſometimes practiſed in war, under the name of repriſals. If a general of the enemy has, without any juſt reaſon, cauſed ſome

ſome priſoners to be hanged, a like number of his men, and of the ſame rank, will be hung up, ſignifying to him that this retaliation will be continued for obliging him to obſerve the laws of war. It is a ſad extremity thus to put a priſoner to death for his general's fault, and if this priſoner before was promiſed his life, repriſals cannot be made on him with any colour of juſtice. Yet as a prince or his general has a right of ſacrificing the lives of his enemies to his ſafety, and that of his men, if he is engaged with an inhuman enemy, who frequently commits ſuch enormities, he appears to have a right of refuſing life to ſome of the priſoners he may take, and of treating them as his were treated. But Scipio's generoſity is rather to be imitated: that great man having reduced ſome Spaniſh princes who had revolted againſt the Romans, declared to them, that on a breach of their faith he would not call the innocent hoſtages to an account, but themſelves, and that he would not revenge it on a diſarmed enemy, but on thoſe who ſhould be found in arms (*a*). Alexander the Great, having cauſe of complaint againſt Darius, for ſome malpractices, ſent him word, that if he continued to make war in ſuch a manner, he would purſue him to the utmoſt, and give no quarter (*b*). It is thus an enemy, violating the laws of war is to be checked, and not by cauſing the penalty due to his crime to fall on innocent victims.

§ 143. Whether a governor of a place can be puniſhed with death for an obſtinate defence?

How could it be conceived in a knowing age, that it is lawful to puniſh with death a governor who has defended his place to the laſt extremity, or who in a weak place has preſumed to make a ſtand againſt a royal army? Yet, even in the laſt century, this notion was ſo common as to make an article in the law of war, and even at preſent it is not totally exploded. What a thought! to puniſh a brave

(*a*) Neque ſe in obſides innoxios, ſed in ipſos, ſi defecerint, ſævitu-rum: nec ab inermi, ſed ab armato, hoſte pœnas expetiturum. Tit. Liv. Lib. XXVIII.

(*b*) Quint. Curt. Lib. IV. cap. I. XI.

man

man for having performed his duty. Very different were the principles of Alexander the Great, when he gave orders for ſparing ſome Mileſians, *on account of their courage and fidelity* (*c*). "As Phyton was led to execution by or-"der of Dionyſius the tyrant, for having obſtinately de-"fended the town of Rhegium, of which he was governor, "he cried out, that to put him to death for defending the "city was unjuſt, and that heaven would ſoon revenge it. "And Diodorus Siculus terms this an unjuſt puniſh-"ment (*d*)." It is in vain to object, that an obſtinate defence, eſpecially in a weak place, againſt a royal army, only cauſes a great effuſion of blood to no purpoſe; for this defence may ſave the ſtate, by delaying the enemy ſome days longer; and beſides, courage ſupplies the want of fortifications. The Chevalier Bayard having thrown himſelf into Meziers, defended it with his uſual intrepidity (*e*), and proved that a brave man is ſometimes capable of ſaving a place, which another would not think tenable. The hiſtory of the famous ſiege of Malta is another inſtance how far men of ſpirit may defend themſelves, when thoroughly determined. How many places have ſurrendered which by a more regular and vigorous defence might have ſtopped the enemy a long time, have weakened their forces, occaſioned the loſs of the remainder of the campaign, or even have ſaved themſelves? In the laſt war, whilſt the ſtrongeſt places in the Netherlands opened their gates in a few days, general Lentrum defended Coni againſt the efforts of two powerful armies holding out, in ſo indifferent a port, forty days from the opening of the trenches, ſaved his town, and with it all Piedmont. It is farther urged that by threatening a commander with death, you may ſhorten the bloody ſiege, ſpare your troops, and gain a valuable opportunity. My

(*c*) Arrian de Exped. Alexand. Lib. I. Cap. XX.

(*d*) Lib. XIV. Cap. CXIII. quoted by Grotius Lib. III. Cap. II. Sect. 16. n. 5.

(*e*) See his life.

anſwer

anſwer is, that a brave man will deſpiſe your menace, or, provoked at ſuch ignominious uſage, will ſell his life at a dear rate, make you pay for your injuſtice, and bury himſelf under the ruins of his fort. But whatever advantage you might promiſe yourſelf from ſuch an unlawful proceeding, this will not warrant you in the uſe of it. The menace of an unjuſt puniſhment is unjuſt in itſelf; it is an inſult and an injury. But to execute it would be barbarous and horrible: and if it is not to take effect, I believe it will be allowed vain and ridiculous. Juſt and decent means may doubtleſs be uſed for inducing a governor not obſtinately to reduce himſelf to the laſt extremity; and this is at preſent done by all wiſe and humane generals. A governor is ſummoned to ſurrender, and in the progreſs of the ſiege an honourable and advantageous capitulation is offered him, with an intimation that if he ſtays too long, he will be admitted only to ſurrender as a priſoner of war, and at diſcretion; if he perſiſts, and at length is forced to ſurrender at diſcretion, all the ſeverity of the law of war may be uſed, both againſt him and his troops. But this right never extends ſo far as to deprive an enemy of life who lays down his arms (Sect. 140.) unleſs he has been guilty of ſome proportionate crime towards the conqueror. (Sect. 141.)

Reſiſtance carried to extremity is puniſhable in a ſubaltern only, on ſuch occaſions when it is manifeſtly uſeleſs. It is then obſtinacy, and not firmneſs or bravery. The end of true courage being always reaſonable. Let us ſuppoſe, for inſtance, a ſtate entirely reduced under the conqueror's arms, except one ſingle fortreſs, that no ſuccour is to be expected from without, no neighbour, no ally, concerns itſelf about ſaving the remainder of this conquered ſtate: The governor is then to be acquainted with the ſtate of affairs, ſummoned to ſurrender, and may be threatened with death on his perſiſting in a defence abſolutely fruitleſs,

fruitleſs, and which can tend only to the effuſion of human blood. Should this make no impreſſion on him, he deſerves the puniſhment with which he has been juſtly threatened. I ſuppoſe the juſtice of the war to be problematical, and that it is not an inſupportable oppreſſion which he oppoſes; for if this governor maintains a cauſe evidently juſt; if he fights to ſave his country from ſlavery: his misfortune will be pitied; the brave will commend him for holding out to the laſt, and dying free.

§ 144. Of fugitive deſerters.

Deſerters found by the victor among his enemies have rendered themſelves guilty towards him, and he has doubtleſs a right of putting them to death. But they are not properly conſidered as enemies, and are rather perfidious citizens, traitors to their country, and this quality, their enliſting with the enemy cannot obliterate, nor exempt them from the puniſhment they have deſerved. At preſent, however, deſertion being unhappily too common, the number of delinquents in ſome meaſure renders clemency neceſſary. And in capitulations a garriſon is uſually allowed to march out with a certain number of covered waggons in which the deſerters are ſaved.

§ 145. Of women, children, the ſick and aged.

Women, children, the ſick and aged, are in the number of enemies (Sect. 70, 72.). And there are rights with regard to them, as belonging to the nation with which another is at war, and the rights and pretenſions between nation and nation affect the body of the ſociety, together with all its members (Book II. Sect. 81, 82. 344.) But theſe are enemies who make no reſiſtance, and conſequently give us no right to treat their perſons ill, or uſe any violence againſt them, much leſs to take away their lives. (Sect. 140.) This is ſo plain a maxim of juſtice and humanity, that at preſent every nation in the leaſt civilized, acquieſces in it. Sometimes indeed, the ſoldier, in his brutal rage, has forced women, or killed them, and put children and aged perſons to the ſword, but

theſe

theſe are exceſſes at which the officers are extremely concerned, and do all they can to put a ſtop to; and a wiſe and humane general even puniſhes them.—However, if women are deſirous of being ſpared, they are to employ themſelves in the occupations of their ſex, and not to play the men in taking arms. Accordingly the military law of the Switzers, which forbids maltreating women, formally excepts thoſe who have committed any acts of hoſtility (*b*).

§ 146. Of the clergy, of men of letters, &c.

The like may be ſaid of the clergy, of men of letters, and other perſons, whoſe callings are very remote from military affairs. Not that theſe have neceſſarily and by their function any character of inviolability with reſpect to an enemy, or that the civil law can confer it on them: but as they do not appear in arms, and oppoſe no force againſt the enemy, he has no right to uſe any againſt them. Among the ancient Romans the prieſts carried arms; Julius Cæſar himſelf was ſovereign pontiff. Dignitaries, Biſhops, and Cardinals have been ſeen in a military garb, and commanding armies. From the time of their acting ſo, they ſubject themſelves to the common fate of military perſons. In battle 'tis preſumed, that they did not pretend to be inviolable.

§ 147. Of peaſants, and in general of all who do not carry arms.

Formerly, every one capable of carrying arms became a ſoldier, when his nation was at war, and eſpecially when attacked. Grotius however (*c*) produces inſtances of ſeveral nations and eminent commanders (*d*) who ſpared the peaſantry in conſideration of the immediate uſefulneſs of their labour. At preſent war is carried on by regular troops, the people, the peaſants, the inhabitants of towns and villages, do not concern themſelves in it, and generally have nothing to fear from the enemy's arms. If the inhabitants ſubmit to him who is maſter of the country,

(*b*) See Simler de repub. Helvet.
(*c*) Book III. Ch. XI. Sect. 11.
(*d*) Cyrus Beliſarius.

pay

pay the contributions impoſed, and refrain from all hoſtilities, they live as ſafe as if they were friends; they even continue in poſſeſſion of what belongs to them. The country people come freely to the camp to ſell their proviſions, and care is taken that they ſhall feel the calamities of war as little as poſſible. A laudable cuſtom, and truly worthy thoſe nations who pretend to humanity, and advantageous to the enemy himſelf, who finds his account in this moderation; by protecting the peaceable inhabitants, keeping the ſoldiers in ſtrict diſcipline, and preſerving a country, the general procures an eaſy ſubſiſtence to his army, and ſaves it many loſſes and dangers. If he has any reaſon to miſtruſt the people, he has a right to diſarm them, to require hoſtages from them: and they who are for avoiding the calamities of war muſt ſubmit to the laws which the enemy thinks proper to impoſe on them.

§ 148. Of the right of making priſoners of war.

But all theſe enemies thus ſubdued or diſarmed, who from the principles of humanity are to be ſpared, belonging to the oppoſite party may lawfully be ſecured and made priſoners, either that they may not take up arms againſt him, or that the enemy may be weakened (Sect. 138.) or, laſtly, that by getting into our power, ſome perſon or child for whom the ſovereign has an affection, the deliverance of theſe valuable pledges may induce him to equitable conditions of peace. Indeed the European nations at preſent ſeldom make uſe of the laſt expedient, an entire ſecurity and liberty being granted to women and children to withdraw where they pleaſe. But this moderation, this politeneſs, doubtleſs very commendable, is not in itſelf abſolutely obligatory, and if a general thinks fit to ſuperſede it, he cannot be juſtly accuſed of breaking the laws of war. He is at liberty to act in this reſpect as he thinks beſt for his own affairs. If without reaſon, and from mere caprice, he denies women this liberty, he will be deemed a ſour moroſe man; he will be cenſured for

for not conforming to a cuſtom eſtabliſhed by humanity: but he may have good reaſons for diſregarding politeneſs, or even the impreſſions of pity in this reſpect. If there are hopes of reducing by famine a ſtrong place of great importance, the uſeleſs mouths are not permitted to come out. And in this there is nothing which is not authoriſed by the law of war. Some great men however have, on occaſions of this nature, carried their compaſſion ſo far as to poſtpone their intereſts to the motions of humanity.

We have mentioned before what Henry the Great did, when he beſieged Paris; to ſuch a noble example we ſhall add that of Titus at the ſiege of Jeruſalem; he was at firſt for driving back into the city great numbers of periſhing wretches, who came out of it: but he could not withſtand the compaſſion which ſuch a ſight raiſed in him, and the ſentiments of humanity prevailed over the maxims of war.

§ 149. A priſoner at war not to be put to death.

As ſoon as your enemy has laid down his arms and ſurrendered his perſon, you have no farther right over his life (Sect. 140.) unleſs he ſhould give you ſuch a right by ſome new crime, or had before committed againſt you a crime deſerving death (Sect. 141.). Therefore it was a dreadful error of antiquity, a moſt unjuſt and ſavage claim, to aſſume a right of putting a priſoner of war to death, and even by the hand of the executioner. However, it is now a long time ſince more juſt and humane principles have taken place. Charles I. King of Naples, having defeated and taken priſoner Conrade, his competitor, cauſed him to be beheaded at Naples, together with Frederick of Auſtria, his fellow priſoner. This barbarity raiſed an univerſal horror, and Peter the third King of Arragon, reproached Charles with it as a deteſtable crime, and till then unheard of among chriſtian princes (*a*).

(*a*) Epiſt. Pet. Arrag. apud Petr. de Vineis.

However,

However, the caſe was of a dangerous rival contending with him for the throne. But ſuppoſing the claims of his rival were unjuſt, Charles might have kept him in priſon till he had renounced them, and given ſecurity for his future behaviour.

§ 150. How priſoners of war are to be uſed.

Priſoners may be ſecured, and for this purpoſe ſhut up: and if there is cauſe to fear their riſing or running away, they may be even fettered. But they are not to be treated harſhly, unleſs perſonally guilty towards him who has them in his power. In this caſe he may puniſh them, otherwiſe he ſhould remember that they are men and unfortunate. When an enemy is conquered, and ſubmits, a great ſoul forgets all reſentment, and is entirely filled with compaſſion for him. The European nations are highly to be praiſed. Priſoners of war are ſeldom ill treated among them. We extol, we love the Engliſh and French at hearing the accounts of the treatment given to priſoners of war on both ſides, among thoſe generous nations. And what is more, by a cuſtom which equally diſplays the humanity of the Europeans, an officer, taken priſoner of war, is releaſed on his parole, and enjoys the comfort of paſſing the time of his impriſonment in his country, with his family; and the party releaſing him thinks itſelf as ſecure of him as if it had detained him in the cloſeſt priſon.

§ 151. Whether priſoners, who cannot be kept or fed, may be put to death.

Formerly a queſtion, not a little perplexing, might have been propoſed. When the number of priſoners is ſo great as not to be kept or fed with ſafety, is there a right of putting them to death? Or ſhall they be ſent back to the enemy at the hazard of thus ſtrengthening him, ſo as on another occaſion to gain the advantage? At preſent the caſe is plain. Theſe priſoners are ſent back on their parole, not to carry arms for a certain time, or to the end of the war. And as every commander neceſſarily has a power of agreeing to the conditions on which the enemy admits his ſurrender, the engagements entered into by him for ſaving his life or his liberty with that

that of his men, are valid, as made within the limits of his powers (Sect. 19.) and his ſovereign cannot annul them. Of this many inſtances appeared during the laſt war; ſeveral Dutch garriſons ſubmitted to the conditions of not ſerving againſt France, or its allies, for one or two years. A body of French troops in Lintz being hemmed in, were by capitulations ſent on this ſide the Rhine, and under a reſtriction not to carry arms againſt the Queen of Hungary for a ſtated time. The ſovereigns of theſe troops adhered to their ſeveral engagements; but theſe conventions have their limits, which conſiſt in not prejudicing the rights of the ſovereign over his ſubjects. Thus an enemy may require from priſoners, in conſideration of their releaſe, that they ſhall not carry arms againſt him till the end of the war; having a right to keep them priſoners till then. But he cannot require that they ſhall for ever renounce the liberty of fighting for their country, as at the end of the war their impriſonment ceaſes; and they, on their ſide, cannot take on themſelves an engagement abſolutely contrary to their quality, as citizens or ſubjects. If their country forſakes them, they are free, and equally entitled to a renunciation on their ſide. But if we are concerned with a formidable nation, ſavage and perfidious, ſhall we ſend back its ſoldiers, by whom it may be enabled to deſtroy us? When our ſafety is incompatible with that of an enemy, though ſubdued, it is out of all queſtion, but that in cool blood a great number of priſoners ſhould be put to death. But it is required, 1. That they were not promiſed their lives. 2. It muſt be well weighed, even to a certainty, that our ſafety evidently demands ſuch a ſacrifice. If prudence will in any-wiſe permit, either to truſt to their parole, or to diſregard their perfidiouſneſs, a generous enemy will rather liſten to the voice of humanity than to that of a timorous circumſpection.

Charles XII. being incumbered with priſoners after the battle of Narva, only diſarmed them and ſent them away; but his enemy, who had not yet forgot the fear which ſuch hardy and intrepid warriors had raiſed in him, cauſed the Swediſh priſoners, which he took at Pultowa, to be carried into Siberia. The Swediſh hero was too confident in his generoſity, while the dextrous monarch of Ruſſia was as rigorouſly ſevere in his prudence: but neceſſity excuſes ſeverity, or rather cauſes it to be overlooked. Admiral Anſon, on taking the rich Acapulco Galleon near Manila, and finding his priſoners to out-number his whole ſhip's company, he confined them in the hold, by which they ſuffered extremely (*a*). But had he expoſed himſelf to the loſs both of ſo rich a prize and of his own ſhip, would the humanity of his conduct have juſtified the imprudence of it? At the battle of Agincourt, Henry V. King of England, after his victory, was, or at leaſt thought himſelf, under the cruel neceſſity of ſacrificing the priſoners to his own ſafety.

"In this univerſal route, ſays Father Daniel, a freſh "misfortune happened, which coſt the lives of a great "number of French. A remainder of their van was "retreating in ſome order, and many joined it, which "the King of England, from an eminence, obſerving, ſup"poſed their intention was to renew the battle. At the "ſame time he received advice that his camp, where he "had left his baggage, was attacked, and ſo it was; for "ſome Picard gentlemen, at the head of about 600 pea"ſants, had fallen on the Engliſh camp. This prince "apprehenſive of ſome unlucky incident, ſent aid du "camps through the army, with orders for putting all the "priſoners to the ſword, leſt, ſhould the battle be re"newed, his ſoldiers might be incumbered with the care of

(*a*) See Anſon's voyage round the world.

"keeping

« keeping them, or they might force an eſcape, and join « their countrymen. The order was immediately put « in execution, and all the priſoners cut off (*b*)." It is only the greateſt neceſſity which can juſtify ſo terrible an execution, and the general whoſe caſe requires it, is greatly to be pitied.

§ 152. Whether priſoners of war may be made ſlaves?

Are priſoners of war to be made ſlaves? Yes; in caſes which give a right to kill them, when they have rendered themſelves perſonally guilty of ſome crime deſerving death. The antients uſed to ſell their priſoners of war for ſlaves. They indeed thought they had a right of putting them to death. In every circumſtance, when I cannot innocently take away my priſoner's life, I have no right to make him a ſlave. If I ſpare his life, and condemn him to a ſtate ſo contrary to the nature of man, I ſtill continue with him the ſtate of war. He lies under no obligation to me, for what is life without freedom? If any one counts life a favour when the grant of it is attended with chains, let him enjoy it, let him accept the kindneſs, ſubmit to his conditions, and fulfil his duties! But they are not what I ſhall teach him: he may find enough ſaid of them in other authors: I ſhall dwell no longer on the ſubject, and indeed this diſgrace of mankind is happily extinct in Europe.

§ 153. Of the exchange and ranſom of priſoners.

For this reaſon priſoners of war are detained, that they may not return again to the enemy, or elſe for obtaining from their ſovereign a juſt ſatisfaction, as the price of their liberty. There is no obligation of releaſing thoſe who are detained with the latter view, till after ſatisfaction is obtained. As to the former, whoever makes a juſt war has a right, if he thinks proper, to detain his priſoners till the end of the war. And then, on releaſing them, he may juſtly

(*b*) Hiſtoire du France, Regne de Charles VI.

require a ranſom either as a compenſation at a peace, or if the war continues, for diminiſhing his enemy's finances at the ſame time that he ſtrengthens him with the return of ſoldiers. The European nations, who are ever to be commended for their care in alleviating the evils of war, have, with regard to priſoners, introduced humane and ſalutary cuſtoms. They are exchanged or ranſomed even during the war, and this is generally ſtipulated in a previous cartel. However, if a nation finds a conſiderable advantage in leaving its ſoldiers priſoners with the enemy during the war, rather than exchange them, it may certainly, unleſs bound by cartel, act as is moſt agreeable to its intereſt. This would be the caſe of a ſtate abounding in men, and at war with a nation more formidable by the courage than the number of its ſoldiers. It would have been of little advantage to the Czar, Peter the Great, to reſtore the Swedes his priſoners for an equal number of Ruſſians.

§ 154. The ſtate is obliged to deliver them.

But the ſtate is obliged, as ſoon as can be done without danger, and has the means in its hands, to deliver, at its own expence, ſuch of its citizens and ſoldiers as are priſoners of war. They are fallen under this misfortune only by acting for its ſervice, and in ſupport of its cauſe. The ſame reaſon dictates that it ſhall provide for their ſupport during impriſonment. Formerly priſoners of war were obliged to redeem themſelves, but then the ranſom paid belonged to the officers or ſoldiers who took them: the modern uſe is more agreeable to reaſon and juſtice. If priſoners cannot be delivered during the courſe of the war, at leaſt their liberty muſt, if poſſible, make an article in the treaty of peace. This is a care which the ſtate owes to thoſe who have expoſed themſelves for it. However, it muſt be allowed that every nation may by a law, after the example of the Romans, and for inſpiring their ſoldiers

ſoldiers to make the moſt vigorous reſiſtance, prohibit priſoners of war from ever being ranſomed: when this is agreed on by the whole ſociety nobody can complain. But ſuch a law is very harſh, and could ſcarce ſuit any but thoſe ambitious heroes who were determined on ſacrificing every thing for making themſelves maſters of the world.

§ 155. Whether an enemy is to be aſſaſſinated or poiſoned.

Since in this chapter we are treating of the rights derived from war, againſt the perſon of the enemy, we cannot more properly introduce a celebrated queſtion on which authors have been much divided, and this is whether all ſorts of means may be employed to take away an enemy's life? whether he may be aſſaſſinated or poiſoned? Some have advanced that in a right of taking away life, the manner is indifferent. A ſtrange maxim! but happily exploded by the confuſed ideas of honour only. I have a right in civil ſociety to puniſh a ſtanderer, to cauſe my property to be reſtored by him who unjuſtly detains it; but ſhall the manner be indifferent. Nations may do themſelves juſtice ſword in hand, when otherwiſe refuſed to them; ſhall it be indifferent to human ſociety that they employ odious means, capable of carrying deſolation through the whole earth, and from which the moſt juſt and moſt equitable of ſovereigns, however ſtrongly ſupported by others, ſhall not be able to preſerve himſelf? But in order to diſmiſs this queſtion with ſolidity, aſſaſſination is by all means to be diſtinguiſhed from ſurpriſes, which in war are doubtleſs very allowable. Should a reſolute ſoldier in the night-time ſteal into the enemy's camp, get to the general's tent, and ſtab him, in this there is nothing contrary to the natural laws of war, nothing but what in a juſt and neceſſary war is commendable. Mutius Scævola has been praiſed by all the great men of antiquity, and Porſenna himſelf, whom he intended to kill, could not but commend his courage.

courage (*a*). Pepin, father of Charlemagne, having paſſed the Rhine with one of his guards, went and killed his enemy in his chamber (*b*). Whatever abſolute cenſures have been paſſed on ſuch bold ſtrokes, the end of them was only to flatter thoſe among the great, who are for leaving all the dangerous part of war to the ſoldiers and ſubalterns. Uſually indeed the authors are puniſhed with ſome painful death; but it is becauſe the prince or the general who is in this manner attacked, in his turn makes uſe of his rights, takes care of his ſafety, and by the example of torture endeavours to deter his enemies from attacking him otherwiſe than by open force. He may proportion his rigour towards an enemy according as his own ſafety requires. Indeed it would be more commendable on both ſides to diſclaim every kind of hoſtility, which lays the enemy under a neceſſity of employing tortures for ſecuring himſelf from them. It may become a cuſtom, a conventional law of war. The generous warriors of the preſent age diſlike ſuch attempts, and would never make the experiment, except on thoſe rare occaſions, when they become neceſſary to the very ſafety and being of their country. As to the ſix hundred Lacedemonians, who under Leonidas broke into the enemy's camp, and made their way directly to the King of Perſia's Camp (*c*); their expedition was according to the common rules of open war. And the king could not treat them more rigorouſly than other enemies. A ſtrict watch baffles any ſuch irruption, ſo that it would be unjuſt to make uſe of tortures in their puniſhment. Accordingly at preſent they are only exerciſed againſt thoſe who convey themſelves by ſubtilty, alone, or in a very ſmall number, and eſpecially if diſguiſed. I therefore call aſſaſſination a

(*a*) See Tit. Liv. Lib. II. Cap. XII. Cicero. pro. P. Sextio. Valer. Max. Lib. III. Cap. III. Plutarch. vit. Poplicol.

(*b*) Grotius Lib. III. Cap. IV. Sect. 18. n. 1.

(*c*) Juſtin. Lib. II. Cap. II.

treacherous

treacherous murder, whether it be perpetrated by traitors, ſubjects of the perſon whom we cauſe to be aſſaſſinated, or of one's own ſovereign; whether it be executed by the hand of any another emiſſary, introducing himſelf as a ſupplicant, a refugee, a deſerter, or, in fine, as a ſtranger; and ſuch an attempt, I ſay, is infamous and execrable, both in him who executes it, and in him who injoins it. Why do we judge an act to be criminal, and contrary to the law of nature, but becauſe ſuch an act is pernicious to human ſociety, and the uſe of it would be deſtructive to men? Now what could be more terrible than the cuſtom of hiring a traitor to aſſaſſinate our enemy. Beſides, were ſuch a licentiouſneſs introduced, the moſt pure virtue, the friendſhip of the greateſt part of ſovereigns would not ſecure a prince's ſafety. Had Titus lived in the time of *the old man of the mountain*, all his tenderneſs for the happineſs of mankind, his punctual obſervance of peace and equity, the reſpect and adoration of every power, could have been no preſervative. On the firſt quarrel which the prince of the *aſſaſſins* had taken into his head to raiſe againſt him, thoſe virtues, that univerſal affection, would not have ſaved him, and mankind would have loſt their darling. It is of no conſequence to ſay that theſe extraordinary ſtrokes are permitted only in favour of right; ſince in their wars all pretend to have right on their ſide. Thus, whoever by his example contributes to the introducing ſo deſtructive a cuſtom, declares himſelf the enemy of mankind, and deſerves the execration of all ages (*a*). The aſſaſſination of William Prince of Orange was generally deteſted, though the Spaniards had declared that prince a rebel. And the ſame nation denied as an atrocious ca-

(*a*) See the dialogue between Julius Cæſar and Cicero, in the Melanges de Literature & Poeſie.

lumny,

lumny, the having the leaſt concern in that of Henry the Great, who was preparing for a war againſt them, which might have ſhook their monarchy.

A treacherous poiſoning has ſomething more odious even than aſſaſſination; the effect would be more inevitable, and the uſe more terrible; accordingly it has been more generally deteſted. Of this Grotius has accumulated many inſtances (*a*). The conſuls Caius Fabricius and Q. Æmilius rejected with horror the propoſal of Pyrrhus's phyſician to poiſon his maſter, and even gave notice to that prince, that he might beware of the traitor, haughtily adding, "It is not to make our court to you that we give this in-"formation, but that we may not draw on ourſelves any "infamy (*b*)." And they excellently ſay, in the ſame letter, that it is for the common intereſt of all nations not to ſet ſuch examples (*c*). It was a maxim of the Roman ſenate, that war to be carried on by arms, and not by poiſon (*d*). Even Tiberius himſelf rejected the propoſal made by the Prince of the Catti, that if poiſon was ſent to him he would deſtroy Arminius. And he received for anſwer, that the Roman people chaſtiſed their enemies by open force, without having recourſe to wicked practices and ſecret machinations (*e*). Tiberius thus making it his glory to imitate the virtue of antient Roman commanders.

This inſtance is the more remarkable, as Arminius had treacherouſly cut off Varius, with three Roman legions. The ſenate, and even Tiberius himſelf did not think that poiſon was to be made uſe of even againſt a

(*a*) Grotius, Book III. Chap. IV. Sect. 15.

(*b*) Οὐδὲ γὰρ ταῦτα σῇ χαρίζι μηνυομεν, ἀλλ' ὅπως μὴ τὸ σὸν ϖαῖδος ἐμὲ λάθοι διαβολὴν ἐνεγκη, &c. Plutarch in Vita Pyrrhi.

(*c*) Sed communis exempli & fidei ergo viſum eſt, uti te ſalvum velimus; ut eſſet, quem armis vincere poſſemus. Apud Aul. Gell. Noct. Attic. Lib. III. Cap. VIII.

(*d*) Armis belli, non venenis, geri debere. Valer. Maxim. Lib. VI. Cap. V. num. 1.

(*e*) Non fraude, neque occultis, ſed palam, et armatum, populum Romanum hoſtes ſuos ulciſci. Tacit. Annal. Lib. II. Cap. LXXXVIII.

deceiver,

deceiver, or by way of retortion or repriſal. Aſſaſſination and poiſoning are therefore contrary to the laws of war, and equally exploded by the law of nature, and the conſent of civilized people. The ſovereign practiſing ſuch execrable means ſhould be accounted the enemy of mankind, and the common ſafety calls on all nations to unite againſt him and join their forces to puniſh him. His conduct particularly authoriſes the enemy, who had been attacked by ſuch odious means, to give him no quarter. Alexander declared, "That he was determined to purſue Darius to the utmoſt, and no longer as a fair enemy, but as a poiſoner and an aſſaſſin (*f*)."

The intereſt and ſafety of commanders and rulers, ſo far from countenancing ſuch practices, ſhould excite them to uſe all poſſible care to ſuppreſs them. It was wiſely ſaid of Eumenes, "That he did not think any general "would, to gain a victory, ſet a pernicious example which "might recoil on himſelf (*g*)." And it was on this ſame principle that Alexander formed his judgment of Beſſus, who had aſſaſſinated Darius (*b*).

§ 156. Whether poiſoned weapons may be uſed in war.

The uſe of poiſoned arms may be excuſed with a little more plauſibility, at leaſt here is no treachery, no clandeſtine practice; however this uſe is not the leſs interdicted by the law of nature, which does not allow us to multiply the evils of war. To get the better of an enemy's efforts he muſt be ſtruck, and if once diſabled, what neceſſity is there that he ſhould inevitably die of his wounds? Beſides, if you poiſon your arms, the enemy will follow your example. And thus, without any advantage to yourſelf for the deciſion of the quarrel, you will render

(*f*) Quint. Curt. Lib. IV. Cap. XI. 18.

(*g*) Nec Antigonum, ne quenquam Ducum, ſic velle vincere, ut ipſe in ſe exemplum peſſimum ſtatuat. Juſtin Lib. XIV. Cap. I. num. 12.

(*b*) Quemquidem (Beſſum) crudi adfixum videre feſtino, omnibus gentibuſque fidei, quam violavit, meritas pœnas ſolventem. Q. Curt. Lib. VI. Cap. III. n. 14.

the

the war more cruel and horrible. War is never permitted to nations, but from neceſſity; all are to refrain from methods which render it more deſtructive, and they are even obliged to oppoſe them. It is therefore with reaſon, and agreeable to their duty, that civilized nations have claſſed among the laws of war, the maxim which prohibits the poiſoning of arms (*i*). And all are warranted by their common ſafety to ſuppreſs and puniſh the firſt who ſhould offer to break through this law.

§ 157. Whether ſprings may be poiſoned?

The poiſoning waters, wells, and ſprings, is ſtill more generally condemned, becauſe, ſay ſome authors, innocent perſons, as well as enemies, may loſe their lives. This is indeed a further reaſon, but it is not the only, nor indeed the true, for it is lawful to fire on an enemy's ſhip though there may be neutral paſſengers on board. But though poiſon is not to be uſed, it is very allowable to divert the water, cut off the ſprings, or by any other manner to render them uſeleſs, that the enemy may be reduced to ſurrender (*b*). This is a milder way than that of arms.

§ 158. Diſpoſitions towards an enemy.

I cannot conclude this ſubject, of what we have a right to do againſt the perſons of the enemy, without ſpeaking a few words concerning the diſpoſitions we are to preſerve towards them. They are indeed deducible from what we have hitherto ſaid (Book II. Chap. I.) Let us never forget that our enemies are men. If we are under the diſagreeable neceſſity of proſecuting our right by force of arms, let us not deſtroy that charity which connects us with all mankind. Thus ſhall we courageouſly defend our country's rights without hurting thoſe of ſociety. Our courage will preſerve itſelf from every ſtain of cruelty, and the luſtre of victory will not be tarniſhed by in-

(*i*) Grotius, Book III. Chap. IV. Sect. 16. confeder. Tom. I. p. 126, 127.

(*k*) Grotius, ibid. Sect. 17.

human

human and brutal actions. Marius and Attila are now deteſted; whereas we cannot forbear admiring and loving Cæſar; his generoſity and clemency almoſt preponderate againſt the injuſtice of his enterpriſes. Moderation and generoſity redound more to the glory of a victor than his courage; they are more certain marks of a ſoul truly great. Beſides the honour which infallibly accompanies this virtue, humanity towards an enemy, has been often attended with immediate and real advantages. Leopold Duke of Auſtria, beſieging Soleure, in the year 1318, threw a bridge over the Aar, and poſted on it a large body of troops. The river ſoon after, by an extraordinary ſwell of its waters, carried away the bridge: On which the beſieged haſtened with ſuch diſpatch to the relief of the men poſted on it, that they ſaved the greateſt part of them. Leopold relenting at this act of generoſity, raiſed the ſiege, and came to an accommodation with that ſtate (*l*). The Duke of Cumberland, after the victory of Dettingen (*m*), appears to me ſtill greater than in the heat of the battle. As he was under the ſurgeon's hands, a French officer, much more dangerouſly wounded than himſelf, being brought that way, the prince immediately directed his ſurgeon to leave him, and aſſiſt that officer. Did the great know how ſuch actions endear them, and what reſpect reſults from ſuch humane conduct, they would ſtudy to imitate them, even though their ſentiments were not of a ſuitable elevation. At preſent the European nations ſeldom fail of making war with a great deal of moderation and generoſity. Theſe diſpoſitions have given riſe to ſeveral commendable cuſtoms, and which are frequently carried to the height of politeneſs. Sometimes refreſhments are ſent to the governors of a beſieged town. It is not uſual to fire on the king's or the general's quarters. This moderation is always a gainer, when we have to do with a generous enemy; but it is no farther bind-

(*l*) Hiſtor. Helvet (*m*) 1743.

ing

ing than as it does not hurt the cauſe we defend; and it is clear that a wiſe general will, in this reſpect, regulate himſelf by junctures, by what the ſafety of the army and ſtate requires, by the greatneſs of the danger, and by the temper and conduct of the enemy. Should a weak nation or town be attacked by a furious conqueror, threatening to deſtroy it, is it to forbear firing on its quarters? Far from it; that is the very place to which, if poſſible, every ſhot ſhould be directed.

§ 159. Of regard towards the perſon of a king who is our enemy.

Formerly, he who killed the king or general of the enemy was commended, and greatly rewarded; the honours annexed to his *ſpolia opima*, are well known. Nothing was more natural; the ancients uſually fighting for their ſafety, and the death of the leader put an end to the war. In our time a ſoldier would ſcarce be ſuffered to boaſt of having killed the ſovereign of the enemy. Thus ſovereigns tacitly agree on the ſafety of their perſons. It muſt be owned that in a war, little enflamed, and where the welfare of the nation does not lie at ſtake, this regard for regal majeſty is entirely commendable, and perfectly conſonant to the reciprocal duties of nations. In ſuch a war to take away the life of the enemy's ſovereign, when it might be ſpared, is probably doing more hurt than is neceſſary for bringing the quarrel to a happy iſſue. But on every occaſion to ſpare a King's perſon is not a law of war; and the obligation is only when there is a power of eaſily taking him priſoner.

CHAP.

CHAP. IX.

Of the Right of War, with regard to things belonging to the Enemy.

§ 160. Principles of the right over things belonging to the enemy.

A STATE taking arms in a juſt cauſe has a double right againſt its enemy. 1. A right of putting itſelf in poſſeſſion of what belongs to it, and which the enemy with-holds; and to this muſt be added the expences incurred to this end, the charges of the war, and the reparation of damages. For were the nation obliged to bear theſe expences and loſſes, it would not fully obtain what is its due, or what belongs to it. 2. It has a right of weakening the enemy, for diſabling him from ſupporting an unjuſt violence (Sect. 138.). The right to take from him all means of reſiſtance. Hence ariſe, as from their principles, all the rights of war with regard to things belonging to the enemy: I ſpeak of ordinary caſes, and of what particularly relates to the enemy's goods. On certain occaſions the right of puniſhing him produces new rights over the things which belong to him, as it alſo gives over his perſon: theſe we ſhall preſently conſider.

§ 161. The right of taking them.

A nation has a right to deprive the enemy of his poſſeſſions, and goods, of every thing which may augment his forces, and enable him to make war. This every one endeavours to perform in the manner moſt ſuitable to him. A nation on every opportunity lays its hands on the enemy's goods, appropriates them to itſelf, and thereby, beſides weakening the adverſary, ſtrengthens itſelf, and at leaſt in part, procures an indemnification, an equivalent, either for the very cauſe of the war, or for the expences

expences and loſſes reſulting from it; a nation here does itſelf juſtice.

§ 162. Of what is taken from the enemy by way of penalty.

The right of ſafety is often a warrant for puniſhing injuſtice or violence. It is an additional plea for depriving an enemy of ſome part of his poſſeſſions. This manner of chaſtiſing a nation is more humane than making the penalty to fall on the perſons of the citizens. In this view things of value, rights, cities, provinces, may be taken from him; but all wars do not give a juſt cauſe of puniſhment. The nation which has, with juſtice and moderation, ſupported a bad cauſe, is in the eye of a generous conqueror rather an object of compaſſion than reſentment: and in a doubtful cauſe we are to ſuppoſe that the enemy ſincerely thinks himſelf in the right (Prelim. Sect. 21. Book III. Sect. 40.). It is therefore nothing leſs than manifeſt injuſtice, void even of plauſible pretences, or odious exceſſes in the proceeding, which give an enemy the right of puniſhing: and on every occaſion the puniſhment is to be limited by what his own ſafety and that of the nation requires. To be ſwayed by clemency, as far as prudence will admit, is noble; that amiable virtue ſeldom fails of being more uſeful than inflexible rigour. The clemency of Henry the Great was of ſingular advantage to his courage, when that good prince found himſelf compelled to conquer his own kingdom. Thoſe who would have continued enemies, if ſubdued only by arms, his goodneſs rendered affectionate ſubjects.

§ 163. Of detenſions for obliging him to give a juſt ſatisfaction.

In fine, a nation ſeizes on what belongs to the enemy, his towns and provinces, for bringing him to reaſonable conditions, for conſtraining him to accept of an equitable and ſolid peace. Thus much more is taken from him than he owes, more than is claimed of him: but this with a deſign of reſtoring the ſurplus by a treaty of peace. The King of France was, in the laſt war, known to declare that he aimed at nothing for himſelf, and at the

treaty

treaty of Aix la Chapelle he actually gave up all his conquests (*a*).

§ 164. Of booty.

As the towns and lands taken from the enemy are called *conquests*, all moveable things constitute the *booty*. This *booty* naturally belongs to the sovereign making war, no less than the conquest; for he alone has such claims against the enemy as warrant him to seize on his goods, and appropriate them to himself. His soldiers, and even the auxiliaries, are only instruments in his hand for asserting his right. He maintains and forms them. Whatever they do is in his name, and for him. Thus there is no difficulty even with regard to the auxiliaries; if they are not associates in the war, it is not made for them, they have no more right to the booty than the conquests. But the sovereign may grant the troops what share of the booty he pleases. At present most nations allow them whatever they can make on certain occasions, when the general allows of plundering what they find on enemies fallen in the field of battle, the pillage of a camp which has been forced, and sometimes that of a town taken by assault. The soldier in several services has also the property of what he can take from the enemy's troops when he is on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of provisions or forage, which are applied to the wants and use of the army. This custom being once admitted in an army, it would be injustice to exclude auxiliaries from the right allowed to the national troops. The Roman soldier was obliged to bring in all the booty he had taken to the public stock. This the general caused to be sold, and after distributing a part

(*a*) The peace was become absolutely necessary to him, and he had in return for his few conquests, Louisbourg, with all its dependencies, which were of more importance to him.

among

among the ſoldiers, according to rank, the reſt was conſigned to the public treaſury.

§ 165. Of contributions.

Inſtead of the pillage of the country and defenceleſs places, a cuſtom has been ſubſtituted more humane and more advantageous to the ſovereign making war. I mean that of contributions. Whoever carries on a juſt war has a right of making the enemy's country contribute to the ſupport of the army, and towards defraying all the charges of the war. Thus he obtains a part of what is due to him, and the ſubjects of the enemy, on ſubmitting to this impoſition, are ſecured from pillage, and the country is preſerved. But a general who would not ſully his reputation, is to moderate his contributions, and proportion them to thoſe on whom they are impoſed. An exceſs in this point is not without the reproach of cruelty and inhumanity: if it ſhews leſs ferocity than ravage and deſtruction it glares with avarice. The inſtances of humanity and diſcretion cannot be too often cited. The long wars of France in the reign of Lewis XIV. furniſh an inſtance which can never be too much commended.—The ſovereigns being reſpectively intereſted in the preſervation of the country, uſed on the commencement of the war to enter into treaties, for regulating the contributions on a ſupportable footing: both the extent of the country in which each could demand contributions, the amount of them, and the manner in which the parties ſent for levying them were to behave, were ſettled. In theſe treaties it was expreſſed, that no body of men under a certain number, ſhould advance into the enemy's country beyond the bounds agreed on, under the penalty of being treated as *parti bleu* (*b*). This was preventing a multitude of diſorders and enormities, committed on quiet people, and generally without the leaſt advantage to the ſovereigns at war. Whence is it that an example ſo noble and wiſe has not been eſtabliſhed?

(*b*) Marauders, or robbers.

If

§ 166. Of ſpoiling.

If for weakening an unjuſt enemy (Sect. 161.) or for puniſhing him (Sect. 162.) it be lawful to carry off his goods, the ſame reaſons juſtify the deſtroying what cannot conveniently be carried off. Thus a country is ravaged, the proviſions or forage deſtroyed, that the enemy may not find a ſubſiſtence there. When his ſhips cannot be taken or brought off, endeavours are uſed to ſink them; all this tends to put an end to the war. But theſe means are to be uſed only with moderation, and according to the exigency. To tear up vines, or cut down fruit trees, is accounted illegal and ſavage, except inflicted to puniſh ſome crime committed by the enemy againſt the laws of war. This is to deſolate a country for many years, and what no ſafety can require. Such a conduct is not dictated by prudence, but by hatred and fury.

§ 167. Of ravaging and burning.

However, on certain occaſions, matters are carried ſtill farther; a country is totally ravaged, towns and villages are ſacked, ſet on fire, and the inhabitants put to the ſword. Dreadful extremity, even when forced to it! Savage and monſtrous exceſſes, when committed without neceſſity! however, they are authorized by two reaſons. 1. The neceſſity of chaſtiſing an unjuſt and barbarous nation, for checking its brutality and preſerving one's ſelf from its depredations. Who will queſtion that the King of Spain and the powers of Italy have not a very good right utterly to deſtroy thoſe maritime towns of Africa, thoſe neſts of pirates, which are continually moleſting their commerce and abuſing their ſubjects; but who will run ſuch lengths with a view of puniſhing only their ſovereign? It is but indirectly that he will feel the puniſhment, and how cruel is it to ruin an innocent people, in order to reach him. The ſame prince whoſe firmneſs and juſt reſentment was commended in the bombardment of Algiers, was after that of Genoa accuſed of pride and inhumanity.

humanity. 2. A country is ravaged, and rendered uninhabitable, for making a barrier, for covering a frontier againſt an enemy, who cannot be ſtopped any other way. A hard reſource indeed! but may it not be uſed againſt an enemy, when with the ſame proſpect a ſovereign lays waſte his own provinces? Czar Peter the Great, in his flight before the army of Charles XII. to ſtop the impetuoſity of a torrent which he could not withſtand, deſtroyed his own country for above fourſcore leagues at length. By this means the Swedes became quite ſpent with want and fatigue, and at Pultowa the Ruſſian monarch reaped the fruits of his circumſpection and ſacrifices. But violent remedies are not to be wantonly uſed, there muſt be reaſons of ſuitable importance to juſtify the uſe of them. A prince who ſhould without neceſſity imitate the Czar's conduct, would be guilty of a great crime in regard to his people: and he who does the like in an enemy's country, when under no conſtraint, or on weak reaſons, becomes the ſcourge of ſociety. The French in the laſt century ravaged and burnt the Palatinate (*b*). All Europe reſounded with invectives and reproaches on this manner of making war. The court vainly covered it with the deſign of ſecuring its frontiers. This was an end which could be little anſwered by laying waſte the Palatinate. It was well known to be the revenge and cruelty of a haughty and implacable miniſter.

§ 168. What things are to be ſpared.

For whatever cauſe a country be ravaged, we ought to ſpare thoſe edifices which do honour to human ſociety, and do not contribute to the enemy's power; ſuch as temples, tombs, public buildings, and all works of a remarkable beauty. What advantage is obtained by deſtroying them? He who acts thus declares himſelf an

(*b*) In 1674, and a ſecond time more terrible in 1689.

enemy

enemy to mankind, wantonly depriving them of thoſe monuments of art and models of taſte. This is the light in which Belliſarius repreſented it to Totila, King of the Goths (c). We ſtill deteſt thoſe barbarians for deſtroying ſo many wonders of art, when they over-ran the Roman empire. Though the reſentment of the great Guſtavus againſt Maximilian, Duke of Bavaria, was entirely juſt, he rejected with indignation the advice of thoſe who were for demoliſhing the ſtately palace of Munich; and took particular care to preſerve that admirable ſtructure.

However, if for carrying on the operations of a war, or the works of a ſiege, there be a neceſſity for deſtroying buildings of this nature; there is doubtleſs a right of ſo doing. The ſovereign of the country, or his general, makes no ſcruple when reduced to it by neceſſity and maxims of war. The governor of a town evidently threatened with a ſiege, ſets fire to the ſuburbs, that they may not be of uſe to the beſiegers for lodging themſelves in them. No body offers to blame him who lays waſte gardens, vineyards, or orchards, for pitching a camp or throwing up an intrenchment; if ſome fine edifice be deſtroyed thereby, it is an accident, an unhappy conſequence of the war, and the general is not at all blameable; unleſs, without the leaſt inconvenience, he might have made his diſpoſitions elſewhere.

§ 169. Of bombarding towns.

In bombarding towns it is difficult to ſpare the fine edifices; at preſent it is only the ramparts and defences of a place which are uſually battered. To deſtroy a place with bombs and red-hot balls is an extremity never practiſed without great reaſons. But it is warranted by the laws of war, when an army has no other reſource for reducing a place on which may depend the ſucceſs of the

(c) See his letter in Procopius. See Grotius, Lib. III. Cap. XII. Sect. 2. Note 11.

war, or when it greatly annoys us. It is alſo ſometimes practiſed when there is no other expedient of facing an enemy to make war with humanity, or for puniſhing him for ſome other illegal outrage. But it is with reluctance that good princes make uſe of their rigorous rights, and never but in extremities. In the year 1694, the Engliſh bombarded ſeveral maritime towns of France, on account of the great damages done to the Britiſh trade by their privateers. But the virtuous and noble minded conſort of William the Third did not receive the news of theſe exploits with an entire ſatisfaction. She expreſſed a ſenſible concern that war ſhould render ſuch hoſtilities neceſſary, adding, That "ſhe hoped both parties would "for the future agree on deſiſting from ſuch odious opera-"tions (*a*)."

§ 170. Demolition of fortreſſes.

Fortreſſes, ramparts, and every kind of fortification, relate ſolely to war, and as in a juſt war nothing is more natural than to raze thoſe which we do not intend to keep, ſo nothing is more lawful. The enemy is thereby weakened, and no innocent perſon is involved in the damages. This is the great advantage France has derived from its victories in a war when ſhe did not aim at making conqueſts.

§ 171. Of ſafeguards.

Safeguards are allowed to lands and houſes intended to be ſpared, whether from mere favour or with the proviſo of a contribution. Theſe conſiſt of ſoldiers who protect them againſt parties, by producing the general's orders. Theſe ſoldiers are ſacred to the enemy, he cannot uſe any hoſtilities towards them, they being there as benefactors, and for the ſafety of the ſubjects. They are to be reſpected in the ſame manner as an eſcort appointed to a garriſon, or priſoners of war, on their return to their country.

§ 172. General rule of moderating the evil which may be done to an enemy.

This is ſufficient to give an idea of the moderation with which, in the moſt juſt war, we are to uſe the right of

(*a*) Hiſtoire du Guillaume III. Liv. VI. Tom. II. page 66.

pillaging

pillaging and ravaging the enemy's country, excluſive of the caſe where an enemy is to be puniſhed, the whole centers in this general rule: All damage done to the enemy unneceſſarily, even hoſtility which does not tend to procure victory, and put an end to the war, is a licentiouſneſs condemned by the law of nature.

§ 173. Rule of the voluntary law of nations on the ſame ſubject.

But this licentiouſneſs is among nations neceſſarily unpuniſhed, and tolerated to a certain degree, and how in particular caſes ſhall we determine preciſely to what length it was neceſſary to carry hoſtilities in order to bring the war to a happy concluſion? And could it be exactly delineated, nations acknowledge no common judge. Each judges of what it has to do in fulfilling its duties. If cauſe be given for continual accuſations of exceſs in hoſtilities, this will only multiply complaints, tempers will be more and more inflamed; freſh injuries will be perpetually ſpringing up, and no period put to the war till one of the parties be abſolutely deſtroyed. Therefore nations are reciprocally to obſerve certain rules; theſe ſhould be general, independent of circumſtances, and the application of them certain and eaſy. Now, theſe rules cannot be ſuch unleſs things be conſidered in an abſolute ſenſe in themſelves, and in their natures. Therefore, as with regard to hoſtilities againſt an enemy's perſon, the voluntary law of nations only prohibits ſuch means as are odious and really unlawful, as poiſoning, aſſaſſination, treachery, maſſacring an enemy who has ſurrendered, and from whom nothing is to be feared; ſo the ſame law, in the queſtion now before us, condemns every hoſtility which of its own nature, and independently of circumſtances, contributes nothing to the ſucceſs of our arms, does not increaſe our forces, nor weaken thoſe of the enemy. And on the other hand, it permits or tolerates every act, which in itſelf is naturally adapted to the end of the war, without pauſing to conſider

conſider whether ſuch hoſtility was requiſite, uſeleſs, or ſuperfluous in that particular caſe, unleſs the exceptions to be made in that caſe were not abſolutely clear. For where there is evidence, the freedom of judgment no longer ſubſiſts. So that to ravage or burn a country is not in general againſt the laws of war. But if an enemy of a much ſuperior ſtrength treats a town or province in this manner, which he might eaſily keep for procuring to himſelf an equitable and advantageous peace, he is generally accuſed of making war like a barbarian. Thus the voluntary deſtruction of public monuments, of temples, tombs, ſtatues, paintings, &c. is abſolutely condemned, even by the voluntary law of nations, as always uſeleſs to the lawful end of war. The pillage and deſtruction of towns, the deſolation of the country, ravages, burnings, are not leſs odious and deteſted on all occaſions, when evidently practiſed without neceſſity, or without urgent reaſons. But as all theſe enormities may be excuſed under pretence of puniſhment, which the enemy deſerves, I ſhall add, that by the neutral and voluntary law of nations, only enormous offences againſt it are to be puniſhed in this manner: and when rigour is not of an abſolute neceſſity, it is always beautiful to liſten to the voice of humanity and clemency. Cicero condemns the deſtruction of Corinth for its inſults towards the Roman ambaſſadors; becauſe Rome was able to aſſert the dignity of its miniſters, without carrying its revenge to ſuch extreme rigour.

CHAP.

CHAP. X.

Of Faith between Enemies, Stratagems, Artifices in War, Spies, and other Practices.

§ 174. Faith to be ſacred between enemies.

THE faith of promiſes and treaties is the baſis of national tranquillity, as we have ſhewn in an expreſs chapter (Book II. Chap. XV.). It is ſacred among men, and abſolutely eſſential to this common ſafety. Are we then diſpenſed from it towards an enemy? To imagine that between two nations at war every duty ceaſes, every tie of humanity is broken, would be an error equally groſs and deſtructive. Men, however reduced to the neceſſity of taking up arms for their defence, do not therefore ceaſe to be men. They are ſtill ſubject to the ſame laws of nature; for otherwiſe there would be no laws of war. Even he who makes an unjuſt war on us is ſtill a man, we ſtill owe him whatever this quality requires of us. But a conflict ariſes between our duties towards ourſelves and thoſe which connect us with other men. The law of ſafety authoriſes us to attempt, againſt this unjuſt enemy, every thing neceſſary for repelling him, or bringing him to reaſon. But all thoſe duties, the exerciſe of which is not neceſſarily ſuſpended by this conflict, ſubſiſt in their full force. They bind us both towards the enemy and towards all others. Now, the obligation of keeping faith is ſo far from ceaſing in time of war, by virtue of the preference which the duties towards ourſelves are intitled to, that it becomes more neceſſary than ever. There are a thouſand occaſions, even in the courſe of the war, when for checking its rage or abating the calamities inſupportable from the common intereſt, the ſafety of each party requires

requires that they ſhould agree on certain points. What would become of priſoners of war, capitulating garriſons, and towns which have ſurrendered, if the word of an enemy was not to be relied on? War would degenerate into an unbridled and cruel licentiouſneſs. Its evils would be without bounds, and how could it at length be terminated, or peace be reſtored? If faith be baniſhed from among enemies, a war can never terminate with ſafety, but by the total deſtruction of one of the parties. The ſlighteſt difference, the leaſt quarrel would break out in a war like that of Hannibal againſt the Romans, in which they fought, not for ſome province, nor for ſovereignty or for glory, but for the very being of the nations (*a*). Thus it is certain that the faith of promiſes and treaties is to be as ſacred in war as in peace, among enemies as among friends.

§ 175. What treaties are to be obſerved among enemies.

The conventions, the treaties made with a nation, are broken or annulled, by a war ariſing between the contracting parties; both as they tacitly ſuppoſe the ſtate at peace, and becauſe each being impowered to deprive the enemy of what belongs to him, he takes from him thoſe rights which had been given him by treaties. Yet here we muſt except thoſe treaties where certain things are ſtipulated in caſe of a rupture; as the time to be allowed ſubjects of both ſides for withdrawing the neutrality which common conſent aſſured to a province, city, &c. Since by treaties of this nature, intended to provide for what ſhall be obſerved in caſe of a rupture, all right of annulling them by a declaration of war is renounced.

For the ſame reaſon, all promiſes made to an enemy in the courſe of a war are obligatory. For from the time of our treating with him, whilſt the ſword is in our hand, there is a tacit, but neceſſary, renunciation of any power to break the convention, by way of compenſation,

(*a*) De ſalute certatum eſt.

and

and on account of the war, as the preceding treaties are broken; otherwiſe it would be doing nothing, it would be abſurd to treat at all with the enemy.

§ 176. On what occaſion they may be broken.

But conventions made during a war are like all other compacts and treaties, of which the reciprocal obſervation is a tacit condition (Book II. Sect. 202.); we are no longer bound to obſerve them toward an enemy who has firſt broken them. And even in too ſeparate conventions, which have no manner of connection; though perfidy is never allowable, becauſe we have to do with an enemy who on another occaſion has failed in his word, yet the performance of a promiſe may be ſuſpended, for obliging him to repair his breach of faith, and what has been promiſed him may be detained by way of ſecurity, till he has made ſatisfaction for his perfidy. Thus at the taking of Namur in 1695, the King of England cauſed Marſhal Boufflers to be put under an arreſt, and notwithſtanding the capitulation, detained him priſoner, for obliging France to repair the infractions of the capitulations of Dixmude and Dainſe (*b*).

§ 177. Of lyes.

Good faith conſiſts not only in the obſervance of promiſes, but alſo in not deceiving on occaſions, where there is the leaſt obligation for ſpeaking truth. We are here engaged in a queſtion which has been warmly debated; and, while the prevailing notions of a lye wanted accuracy or perſpicuity, appeared not a little intricate. Several and eſpecially divines, have made truth a kind of deity, to which in itſelf, and independently of its effects, we owe I know not what inviolable reſpect. They have abſolutely cenſured all diſcourſe contrary to the ſpeaker's ſentiment; they have eſtabliſhed, that we are on all occaſions, where we cannot be ſilent, to ſpeak according to the known truth, and rather than be wanting in reſpect to this deity, they have ſacrificed the moſt dear and valuable

(*b*) Hiſtoire de Guillaume III. Tom. II. p. 148.

concerns.

concerns. But ſome more clear-ſighted philoſophers have explained this idea, ſo confuſed and falſe in its conſequences. It has been owned that truth in general is to be reſpected as the ſoul of ſociety, the baſis of confidence in the commerce and intercourſe of men; and therefore that a man is not to lye, even in matters of indifference, leaſt he weaken the reſpect due to truth in general, and injure himſelf by rendering his word ſuſpected, even when he ſpeaks ſeriouſly. But by thus grounding the reſpect due to truth on its effects, men are led into the right way, and ever ſince it has been eaſy to diſtinguiſh between the occaſions where we are obliged to ſpeak the truth, or declare our thoughts, and thoſe where there is no ſuch obligation. The appellation of lyes is given only to the words of a man ſpeaking contrary to his thoughts, on occaſions where he is obliged to ſpeak truth. Another name, in Latin *falſiloquium*, is applied to any falſe diſcourſe to perſons who in that particular caſe are not to be told the truth. Theſe principles being laid down, it is not difficult to indicate what, on occaſion, is to be the lawful uſe of truth or of falſity towards an enemy. Whenever we have expreſsly or tacitly engaged to ſpeak truth, we are indiſpenſably obliged to it by that faith of which we have proved the inviolability. Such is the caſe of conventions or treaties. It is of abſolute neceſſity that there ſhould be in them a tacit engagement, for to ſay that we do not engage not to deceive the enemy under colour of treating with him would be abſurd: it would be mere quibble and chicanery. Truth is alſo to be told to an enemy on all occaſions where we are naturally obliged to it by the laws of humanity; that is, when the ſucceſs of our arms, and the duties we owe ourſelves do not claſh with the common duties of humanity, and in the preſent caſe ſuſpend their force and exerciſe. Thus when priſoners, either on ranſom or exchange, are ſent away, it would be

be infamous to put them in a dangerous road. Should the prince or the enemy's general inquire after a woman or a child, who is dear to him, it would be ſcandalous to deceive him.

§ 178. Of ſtratagems and artifices in war.

But when by leading an enemy into an error, either by a diſcourſe where we are not obliged to ſpeak truth, or by ſome feint, we can procure ourſelves an advantage in the war which it would be lawful to ſeek by open force; this doubtleſs is legal. I ſay farther, as humanity obliges us in the purſuit of our rights to prefer the mildeſt means, if by a ſtratagem, a feint void of perfidy, we can make ourſelves maſters of a ſtrong place, ſurpriſe the enemy, and overcome him, it is much better, it is really more commendable to ſucceed in this manner than by a bloody ſiege, or the carnage of a battle. But the ſaving of blood is not of ſuch weight as to warrant perfidy, the conſequences of which would be infinitely dreadful, and when ſovereigns were once embarked in a war, would cut off all means of treating together for reſtoring peace (Sect. 174.). Deluſions towards an enemy, free from perfidy, either in words or actions, ſnares laid for him conſiſtent with the rights of war, are ſtratagems, the uſe of which have always been acknowledged lawful, and had often a great ſhare in the glory of celebrated commanders. The King of England, William III. having diſcovered that one of his ſecretaries ſent intelligence to the enemy of every thing, cauſed the traitor to be ſecretly put under arreſt, and made him write to the Duke of Luxemburgh, that the next day the troops would make a general forage, ſupported by a large body of infantry with cannon. And this artifice he made uſe of for ſurpriſing the French army at Steinkirk, but by the activity of the French general, and the courage of his troops, though the meaſures were ſo artfully contrived, the ſucceſs was not anſwerable (*a*).

In the uſe of ſtratagems we ſhould regard not only the faith due to an enemy, but alſo the rights of humanity,

(*a*) Memoires de Fouquieres, Tom. III. p. 87, &c.

and

and avoid doing things the introducing which would be pernicious to mankind. Since the commencement of hoſtilities between France and England, an Engliſh frigate is ſaid to have appeared near Calais, and made ſignals of diſtreſs, with a view of bringing off ſome veſſel, and actually ſeized a boat and ſome ſailors, who generouſly came to its aſſiſtance. If the fact be ſo, this unbecoming ſtratagem deſerves a ſevere puniſhment. It tends to damp a benevolent charity ſo ſacred to the intereſts of mankind, and ſo laudable even among enemies; beſides, to make ſignals of diſtreſs is to aſk aſſiſtance, which certainly promiſes all kind of the utmoſt ſafety to thoſe who give this kindly ſuccour. Therefore the action attributed to this frigate implies an odious perfidy.

Some nations, even the Romans, for a long time profeſſed to deſpiſe every kind of artifice, ſurpriſe, or ſtratagem, in war; and others went ſo far as to ſend notice of the place and time for giving battle (*b*). In this conduct there was more generoſity than diſcretion. It would indeed be very laudable if, as in the frenzy of duels, the only buſineſs was to diſplay perſonal courage; but a war is made to defend our country, to proſecute by force what is unjuſtly denied us, and the ſure means are alſo the moſt commendable, provided they be not unlawful and odious in themſelves (*c*). The contempt of artifice, ſtratagem, and ſurpriſe, proceeds often as in the caſe of Achilles, from a noble confidence in perſonal valour and ſtrength: and it muſt be owned that when an enemy may be defeated with open force, in a pitched battle, there are

(*b*) This was the practice of the ancient Gauls. See Livy. It is ſaid of Achilles, that he was for fighting openly, and not of a temper to have made one of thoſe who were ſhut up in the famous wooden horſe, which proved fatal to the Trojans.

Ille non incluſus equo, Minervæ
Sacra mentito, male feriatos
Troas, et lætam Priami choreis
Fellerat Aulam:
Sed palam captis gravis . . . . . Hor. Lib. IV. Odyſſ. VI.

(*c*) Virg. Æn. II. v. 390.

greater

greater hopes of having quelled and reduced him to ſue for peace, than if the advantage was owing to ſurpriſe; as Livy (*d*) makes thoſe generous ſenators ſay, who did not approve of the manner of proceeding againſt Perſeus, as not altogether ſincere. Therefore, when plain and open courage may ſecure a victory, there are occaſions when it is preferable to artifice, becauſe the advantages gained to the ſtate are more ſolid and permanent.

§ 179. Of ſpies.

The uſe of ſpies is a kind of clandeſtine practice or deceit in war. Theſe find means to inſinuate themſelves among the enemy, in order to diſcover the ſtate of his affairs, to pry into his deſigns, and then give intelligence to him who employs them. Spies are generally puniſhed capitally, and not unjuſtly; there being ſcarce any other way to prevent the miſchief they may do (Sect. 155.). For this reaſon a man of honour, who would not expoſe himſelf to die by the hand of a common executioner, ever declines ſerving as a ſpy: he counts it beneath him, as it can ſcarce be done without ſome kind of treachery. The ſovereign cannot therefore lawfully require ſuch a ſervice from his ſubjects, unleſs in ſome ſingular caſe, and that of the laſt importance. The mercenary are allured to it by great rewards. If thoſe whom a ſovereign employs make a voluntary offer, or if they be not the enemy's ſubjects, or have no connection with him, he may unqueſtionably make uſe of their ſervice without offence to juſtice or honour; but is it lawful, is it decent, to ſolicit the enemy's ſubjects to act as ſpies, and betray him? To this the following paragraph may ſerve as an anſwer.

§ 180. Of practices for ſeducing the enemy's men.

It is aſked in general whether it be lawful to ſeduce the enemy's men, to engage them to tranſgreſs their duty by an infamous treachery? Here we muſt diſtinguiſh be-

(*d*) Tit. Liv. Lib. XLII. Cap. XLVII.

tween

tween what is due to the enemy, notwithſtanding the ſtate of the war, and what is required by the internal laws of conſcience, and the rules of probity. Now the enemy may be weakened by all poſſible means, provided they do not affect the common ſafety of human ſociety, as poiſon and aſſaſſination (Sect. 155.). The ſeducing a ſubject to turn ſpy, that of a governor to deliver up his place, does not ſtrike at the foundation of the common ſafety and welfare of ſociety. Subjects acting as the enemy's ſpies, are not a fatal and inevitable evil, they may in ſome meaſure be guarded againſt, and as to the ſecurity of fortreſſes, it is the ſovereign's concern to chuſe proper governors. Thus theſe means are not contrary to the external law of nations, nor can the enemy complain of them as odious proceedings. Accordingly they are practiced in all wars. But are they juſt, and compatible with the laws of a pure conſcience? Certainly no. And of this the generals themſelves are ſenſible, as they are never heard to boaſt of having practiſed them. Seducing a ſubject to betray his country, ſuborning a traitor to ſet fire to a magazine, practiſing on the fidelity of a governor, inticing him, perſuading him to deliver up a place, is prompting ſuch perſons to commit deteſtable crimes. Is it honeſt to incite our moſt inveterate enemy to be guilty of a crime? If ſuch practices are at all excuſable, it can be only in a very juſt war, and for ſaving our country, when threatened with ruin by a lawleſs conqueror. The guilt of a ſubject or general who betrays his prince in a cauſe manifeſtly unjuſt, does not appear ſo very odious. He who himſelf tramples upon juſtice and probity, deſerves in his turn to feel the effects of perfidy and wickedneſs. And if ever it is excuſable to depart from the ſtrict rules of probity, it is againſt ſuch an enemy, and in ſuch an extremity. The Romans, whoſe ideas concerning the rights of war were ſo pure and elevated, did not approve of ſuch dark practices; made no account of the conſul

Cæpio's

Cæpio's victory over Viriatus, becauſe it had been purchaſed. Valerius Maximus ſays, that it was ſtained with a double perfidy (*a*); and another hiſtorian ſays, that the ſenate did not approve of it (*b*).

§ 181. Whether the offers of a traitor may be accepted.

It is a different thing merely to accept of the offers of a traitor. We do not ſeduce him, and though we deteſt his crime, we ſerve ourſelves. Transfuges and deſerters commit a crime againſt their ſovereign; yet according to the Roman civilians they are received by the law of war (*c*). If a governor ſells himſelf, and offers for a ſum of money to deliver up his town; ſhall we ſcruple to take advantage of his crime, and to obtain without danger what we have a right to take by force? But when we know ourſelves able to ſucceed without the aſſiſtance of traitors, it is noble to reject their offers with deteſtation. The Romans, in their heroic ages, in thoſe times when they uſed to give ſuch illuſtrious examples of magnanimity and virtue, ever expreſſed their abhorrence of any advantage offered them by any treacherous ſubjects of the enemy. They not only acquainted Pyrrhus with the atrocious deſign of his Phyſician, but likewiſe, refuſing to avail themſelves of a leſſer crime, ſent back, bound to the Faliſci, a traitor who had offered to deliver up the king's children (*d*).

But when the enemy is at variance we may very lawfully hold a correſpondence with one of the parties, and make uſe of the right, which it judges to have, of hurting its

(*a*) Viriati etiam cædes duplicem perfidiæ accuſationem recepit: in amicis quod eorum manibus interemptus eſt: in Q. Servilio Cæpione conſule, quia is ſceleris hujus auctor, impunitate promiſſâ, fuit: victoriamque non meruit ſed emit. Lib. IX. Cap. 6. num. 4. Though this inſtance ſeems to regard another point (aſſaſſination) yet, according to other authors, it does not appear that Cæpio had practiced with Viriatus's ſoldiers, to aſſaſſinate him. Among others ſee Eutropius. Lib. IV. Cap. VIII.

(*b*) Quæ victoria quia empta erat, a ſenatu non probata. Auctor. de viris illuſtr. Cap. LXXI.

(*c*) Transfugam jure belli reciſſimus. Digeſt. L. 41. Titul 1. de adquir. ter. dom. Leg. 51.

(*d*) Eadem fide indicatum, Pyrrho regi medicum, vitæ ejus inſidiantem: eadem Faliſcis victum traditum proditorem liberorum regis. Tit. Liv. Lib. XLII. Cap. XLVII.

adverſary.

adverſary. Thus we promote our own affairs without ſeducing others, or being in anywiſe partakers of their guilt. If we take advantage of his error; this is doubtleſs allowable againſt an enemy.

§ 182. Of deceitful intelligence.

A deceitful intelligence is that of a man who feigns to betray his own party with a view of drawing the enemy into a ſnare. This when done deliberately, and by making the firſt advances is treachery, and an infamous practice; but an officer or governor of a place, when tampered with by the enemy, may very lawfully, on certain occaſions, with a view of deceiving the ſeducer, ſeem to lend an ear to the propoſal; an injury was offered to him by tempting his fidelity; and to draw the deceiver into the ſnare is no more than a juſt revenge. By this conduct he neither hurts the faith of promiſes nor the welfare of mankind; for criminal engagements are abſolutely null, and never to be fulfilled; and it would be well if the promiſes of traitors could not be relied on, that they were on all ſides ſurrounded with uncertainties and dangers. Therefore a ſuperior, on information that the enemy is tempting the fidelity of an officer or ſoldier, makes no ſcruple of ordering this ſubaltern to feign himſelf gained over, and to model his pretended treachery ſo as to draw the enemy into an ambuſcade; the ſubaltern is obliged to obey. But if the ſeduction be practiſed immediately on the commander in chief, a man of honour chuſes, as he ought, to reject an injurious overture openly, and with indignation.

CHAP.

CHAP. XI.

Of the Sovereign's making an unjuſt War.

§ 183. An unjuſt war gives no manner of right.

ALL the right of a power to make war is derived from the juſtice of his cauſe. The unjuſt party who attacks or threatens him, or with-holds what belongs to him, in a word, who does him an injury, lays him under the neceſſity of defending himſelf, or doing himſelf juſtice, ſword in hand; he authorizes him in all the acts of hoſtility neceſſary for procuring a complete ſatisfaction. Whoever therefore takes arms without a lawful cauſe can abſolutely have no kind of right; all the hoſtilities he commits are unjuſt.

§ 184. Great guilt of the ſovereign who undertakes it.

He is chargeable with all the evils, all the horrors of the war; all the effuſion of blood, the deſolation of families, the rapine, the violences, the ravages, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppreſſing, maſſacring, them without cauſe; guilty towards his people, of drawing them into acts of injuſtice, expoſing their lives without neceſſity, without reaſon; towards that part of his ſubjects whom the war ruins, or who are great ſufferers by it, of loſing their lives, their fortune, or their health. Laſtly, he is guilty towards all mankind, of diſturbing their quiet, and ſetting a pernicious example. Shocking catalogue of miſeries and crimes! dreadful account to be given to the King of Kings, to the common Father of men! May this light ſketch ſtrike the eyes of the conductors of nations, princes, and their miniſters. Why may not we expect ſome benefit from it, are the great loſt to all ſentiments of humanity and honour, of duty and religion? And ſhould our weak

voice throughout the whole ſucceſſion of ages prevent a ſingle war only, how glorioufly would our labour be rewarded?

§ 185. His obligations.

He who does an injury is bound to repair the damage, or to make a juſt ſatisfaction, if the evil be not irreparable, and even to penalty, if penalty be neceſſary, by way of example, for the ſafety of the party offended, and alſo for that of human ſociety. This is the caſe of a prince who is the author of an unjuſt war. He is to reſtore whatever he has taken, ſend back the priſoners at his own expence; he is to make compenſation to the enemy for the injuries and loſſes he brought upon him; to relieve deſtitute families, and, was it poſſible, to repair the loſs of a father, a ſon, or a huſband.

§ 186. Difficulty of repairing the injury he has done.

But how can he repair ſo many injuries? Many are in their own nature irreparable. And as to thoſe which may be compenſated by an equivalent, whence ſhall the unjuſt ſovereign raiſe a ſufficiency for expiating his violence? The Prince's perſonal wealth will not anſwer the demand; ſhall he give away that of his ſubjects, which does not belong to him? Shall he ſacrifice the national lands, a part of the ſtate? But the ſtate is not his patrimony (Book I. Sect. 61.) He cannot diſpoſe of it at will. And however the nation be, to a certain point, bound to its conductor; beſides the injuſtice of puniſhing it directly for faults of which it is not guilty, if it is bound by the ſovereign's acts, it is only towards other nations which have their recourſe againſt it (Book I. Sect. 40. Book II. Sect. 81. 82.) The ſovereign cannot throw on it the penalty of his violences, nor ſtrip it to repair them. And was it in his power, would this clear him of every thing? Would his conſcience be pure, though acquitted towards the enemy? Is he ſo to his people? It is a ſtrange kind of juſtice to repair injuries at the expence of a third perſon; this is

no

no more than changing the object of his injuſtice. Weigh all theſe things ye conductors of nations! and having clearly ſeen that an unjuſt war draws you into a multitude of iniquities, which all your power cannot repair, it is to be hoped that you will be leſs haſty to engage in them.

§ 187. Whether the nation and the military are bound to any thing?

The reſtitution of conqueſts, of priſoners, and of ſuch effects which may be found again, admits of no difficulty on the injuſtice of the war being acknowledged. The nation aggregately, and private perſons knowing the injuſtice of their poſſeſſion, are to reſtore every thing which has been wrongfully acquired. But as to the reparation of any damage, are the military, generals, officers, and ſoldiers, in conſcience obliged to repair the injuries which they have done; not from any ill-will of their own, but as inſtruments in the hands of their ſovereign? I am ſurpriſed that the judicious [b] Grotius ſhould, without diſtinction, hold the affirmative; it is a deciſion which cannot ſupport itſelf, but in the caſe of a war ſo palpably, ſo indiſputably unjuſt, that it admits of no ſecret reaſon of ſtate, or any other capable of juſtifying it; a caſe in politics almoſt impoſſible. On all occaſions ſuſceptible of doubt, the whole nation, the individuals, and eſpecially the military, refer it to thoſe who govern, to the ſovereign, and are obliged to it by eſſential principles of political ſociety and of government. How could public affairs be carried on, if at every ſtep of the ſovereign the ſubjects were to weigh his reaſons? If they could refuſe to march for a war, concerning which they had any ſcruple. Prudence ſometimes does not admit that a ſovereign ſhould make known all his reaſons. It is the duty of ſubjects to ſuppoſe them juſt and wiſe, while a full and abſolute evidence does not tell them to the contrary. When therefore in ſuch thoughts

[b] Grotius, de jure bell. et pac. Lib. III. Cap. X.

they have lent their assistance in a war, which afterwards is found to be unjust, the sovereign alone is guilty. He alone is bound to repair the injuries. The subjects, and in particular the military, are innocent, they have acted only from a necessary obedience. They are only to deliver up what they have acquired in such a war, as having no lawful title to possession. This I believe to be almost the unanimous opinion of honest men, and of those officers who distinguish themselves by their honour and probity. Their case here is that of all those who are the executors of the sovereign's orders. Government would be impracticable if every one of its instruments was to weigh its commands, and thoroughly canvass their justice before they obeyed them. But if, for the welfare of the state, they are to suppose the sovereign's orders to be just, they are not responsible for them.

CHAP. XII.

Of the voluntary Law of Nations, as it regards the Effects of a War in Form, independently of the Justice of the Cause.

§ 188. That nations cannot insist on the strictness of the law of nature towards each other.

ALL we have said in the preceding chapter is a consequence of the true principles of the eternal rules of justice. They are the dispositions of that sacred law which nature, or its divine author, has prescribed to nations. He alone whom justice and necessity have armed, has a right to make war; he alone is impowered to attack his enemy, deprive him of life, and wrest from him his goods and possessions. Such is the decision of *the law of nations*, or of the law of nature, to the observation of which nations are strictly bound (Prelim. Sect. 7.) It is the inviolable rule which each is conscientiously to

to follow. But in the conteſt of ſovereigns who live together in a ſtate of nature, how can this rule be aſſerted? They acknowledge no ſuperior. Who then ſhall be judge between them, for aſſigning to each his rights and obligations? Who ſhall ſay to this, you are in the right to take up arms, to fall on him, and reduce him by force? Or to the other, all the hoſtilities you commit will be unjuſt. Your victories will be ſo many murders, your conqueſts rapines and robberies. Every free and ſovereign ſtate has a right of determining according to the dictates of conſcience what its duties require from it, and what it can or cannot do with juſtice (Prelim. Sect. 16.) Others in taking on themſelves to judge of this, invade its liberty; they hurt it in its moſt valuable rights (Prelim. Sect. 15.) and then each declaring juſtice to be on its ſide, will arrogate to itſelf all the rights of war, and pretend that its enemies have none, that his hoſtilities are ſo many robberies, ſo many infractions of the law of nations, in the puniſhment of which all ſtates ſhould unite. The deciſion of the law and the controverſy is ſo far from being forwarded by it, that the quarrel will become more bloody, more calamitous in its effects, and alſo more difficult to terminate. Nor is this all; the neutral nations themſelves will be drawn into the diſpute, and thus entangled in the quarrel. If an unjuſt war cannot do any thing with propriety, while an acknowledged judge, and among nations there is none ſuch, has not definitely pronounced concerning the juſtice of the war, there can be no certain poſſeſſion of things taken in war; they will always be liable to be claimed, as effects carried off by robbers.

§ 189. Why the voluntary law of nations is to be admitted among men.

Let us then leave the ſtrictneſs of the law of nature to the conſcience of ſovereigns; they are doubtleſs never to deviate from it; but as to the external effects of

of the law among men, we muſt neceſſarily have recourſe to rules of a more certain and eaſy application; and this for the very ſafety and advantage of the great ſociety of mankind. Theſe are the rules of the voluntary law of nations (Prelim. Sect. 21.) The law of nature, whoſe object is the greateſt good of human ſociety, which protects the liberty of every nation, which requires that their miſunderſtandings of ſovereigns ſhould be carried to an iſſue, that their quarrels ſhould be terminated and brought to a ſpeedy period. This law I ſay, recommends the obſervance of the voluntary law of nations for the common advantage of ſtates, in the ſame manner as it approves of the alterations made in the rules of the law of nature by the civil law, with a view of rendering men more ſuitable to the ſtate of political ſociety, and of acquiring a more eaſy and certain application. Let us therefore apply to the particular ſubject of war, the general obſervation in our preliminary (Sect. 28.) A nation or ſovereign, when deliberating on what meaſures its duties preſcribe, is never to loſe ſight of the *neceſſary* law, whoſe obligation on the conſcience is inviolable. But in examining what it can require from other ſtates, it owes a deference to the voluntary law of nations, and even ſhould limit its juſt claims by the rules of a law, the maxims of which have for their object the happineſs and advantage of the univerſal ſociety of nations. Though the *neceſſary* law be its invariable rule, with regard to itſelf, it muſt allow others to avail themſelves of the *voluntary* law of nations.

§ 190. A war in form, as to its effects, is to be accounted juſt on both ſides.

The firſt rule of this, in the point before us, is, that *a war in form as to its effects, is to be accounted juſt on both ſides.* This is abſolutely neceſſary, as we have juſt ſhewn, for introducing ſome order and rule into ſo violent an operation as that of arms, for limiting the calamities

calamities of which it is productive, and that a door may always be left open for the return of peace. It is even impracticable for nations to act otherwiſe among themſelves, as they acknowledge no judge. Thus the rights, founded on the ſtate of war, the lawfulneſs of its effects, the validity of the acquiſitions made by arms, do not externally and among men depend on the juſtice of the cauſe, but on the legality of the means in themſelves; that is, on every thing requiſite to conſtitute a *war in form*. If the enemy keeps to all the rules of a war in form (Book III. Chap IV.) we are not entitled to complain of him as a violater of the law of nations. He has the ſame pretences to right as we have ourſelves; and all our reſource lies in a victory, or an accommodation.

§ 191. Whatever is permitted to one, is ſo to the other

Second rule. The war being reputed equal between two enemies, *whatever is permitted to one, in virtue of the ſtate of war, is alſo permitted to the other*. Accordingly no nation, under pretence of juſtice being on its ſide, ever complains of the hoſtilities of the enemy, while they obſerve the terms preſcribed by the common laws of war. We have, in the foregoing chapter, treated of what is allowable in a juſt war. It is preciſely that, and no more, which the voluntary law equally authorizes in both parties.

This law puts things between both on a parity, but allows to neither what is in itſelf unlawful; it can never countenance a wild licentiouſneſs. If therefore nations tranſgreſs theſe bounds, if in ſupport of a juſt cauſe they carry hoſtilities beyond what the internal and neceſſary law permits in general, far be it from us to charge theſe exceſſes on the voluntary law of nations, they ariſe ſolely from a deprivation of manners, which produces an unjuſt and barbarous cuſtom; ſuch are thoſe horrid enormities ſometimes committted by the ſoldiers in a town taken by ſtorm.

We

§ 192. Voluntary law gives no more than impunity to him who makes an unjuſt war.

We are never to forget that this voluntary law of nations, which is admitted from neceſſity, and to avoid greater evils, (Sect. 188, 189.) *does not give to him whoſe arms are unjuſt a genuine right, capable of juſtifying his conduct, and acquitting his conſcience, but only the external effect of the law and impunity among men.* This ſufficiently appears by what we have ſaid in eſtabliſhing the voluntary law of nations. The Sovereign whoſe arms are not authoriſed by juſtice, is not thereby the leſs unjuſt, nor leſs guilty againſt the ſacred law of nature, though not to envenom the evils of human ſociety, when it would prevent them, the law of nature itſelf requires, that he ſhould be permitted to have the ſame external rights as juſtly belong to his enemy. In the ſame manner, he may, by the civil law, refuſe to pay his debts in caſe of preſcription; but he then offends againſt his duty; he takes advantage of a law enacted for preventing the increaſe of vexatious ſuits, but he is not founded on any genuine right.

Nations being actually agreed in the obſervance of the rules, which we attribute to the voluntary law of nations, Grotius founds them on an open conſent in the people, and attributes them to the arbitrary law of nations. But, beſides the difficulty which would often occur in proving ſuch engagement, it would be of force only againſt thoſe who had formerly entered into it; did ſuch an engagement exiſt, it would relate to the conventional law of nations, which, as proved by hiſtory, not from reaſoning, is founded on facts, and not on principles.

In this work we lay down the natural principles of the law of nations. We deduce them from nature itſelf: and what we call the voluntary law of nations conſiſts in rules of conduct, external right, to which the law of nature

nature requires the conſent of nations. So that there is a right of ſuppoſing their conſent without ſeeking for it in the annals of the world; for had they not given it, the law of nature ſupplies that want, and gives it for them. Here nations are not free in their conſent; to refuſe it would be hurting the common right of nations (Prelim. Sect. 21.)

This voluntary law of nations, once eſtabliſhed, is of very extenſive uſe, and is far from being a chimera, an arbitrary or groundleſs fiction. It flows from the ſame ſource, and is founded on the ſame principles, with the *neutral and neceſſary law*. Wherefore does nature preſcribe ſuch and ſuch rules of conduct to men? Becauſe thoſe rules are neceſſary to the ſafety and welfare of mankind. But the maxims of the neceſſary law of nations are founded immediately on the nature of things, and particularly on that of men, and political ſociety. The *voluntary* law of nations ſuppoſes a farther principle, the nature of the grand ſociety of nations, and their mutual intercourſe. The former enjoins to nations what is abſolutely neceſſary and naturally tends to their perfection and common happineſs. The latter tolerates what cannot be avoided, but by introducing greater evils.

CHAP.

CHAP. XIII.

Of Acquiſitions by War, and particularly of Conqueſt.

§ 193. How war is a method of acquiſition.

IF it be lawful to carry off things belonging to an enemy, with a view of weakening him, (Sect. 160.) and ſometimes of puniſhing him (Sect. 162.) it is no leſs lawful in a juſt war to appropriate to ourſelves thoſe things by a kind of compenſation, which the civilians term *expletio juris* (Sect. 161.) They are detained as an equivalent for what is due by the enemy, for the expences and damages which he has occaſioned, and even when there is cauſe of puniſhing him, inſtead of the penalty which he has deſerved. For when I cannot procure to myſelf the individual thing which belongs or is due to me, I have a right to an equivalent; which, by the rules of *expletive juſtice*, and according to moral eſtimate, is conſidered as the thing itſelf. Thus war founded on juſtice is according to the law of nature, which conſtitutes the neceſſary law of nations, a juſt method of acquiſition.

§ 194. Meaſure of the right it gives.

But this ſacred law authorizes the acquiſition made by juſt arms, only within the limits of juſtice; that is, as far as a complete ſatisfaction in the meaſure neceſſary for anſwering the lawful ends we have juſt mentioned. An equitable conqueror, inſtead of being ſwayed by ambition and avarice, will make a juſt eſtimate of what is due to him; that is, of the very thing which has cauſed the war; and if the thing itſelf is not to be procured, of the damages and expences of the war, or will detain no more of the enemy's goods than is preciſely the equivalent. But if he has to do with a perfidious,

perfidious, reſtleſs, and dangerous enemy, he will by way of penalty deprive him of ſome of his towns or provinces, and keep them as a barrier. Nothing is more allowable than to weaken an enemy who is become formidable, and has rendered himſelf ſuſpected. The lawful end of the penaly is future ſecurity. Theſe are conditions which render an acquiſition, made by arms, juſt and irreproachable before God and our own conſcience; juſtice in the cauſe, and equity in the ſatisfaction.

§ 195. Diſpoſitions of the voluntary law of nations.

But nations cannot among themſelves inſiſt on this rigid juſtice. By the diſpoſitions of the voluntary law of nations, every war in form, as to its effects, is conſidered as juſt on both ſides (Sect. 190.) And there is no right of judging a nation with regard to the exceſs of its claims, or from what it believes neceſſary to its ſafety. (Prelim. Sect. 21.) Therefore, by the voluntary law of nations, every acquiſition obtained by a war in form is valid, independently of the juſtice of the cauſe, and the reaſons which the conqueror may have for attributing to himſelf the property of what he has taken. Accordingly among nations conqueſts has been deemed a lawful title, and has ſeldom, if ever, been diſputed, unleſs owing to a war not only unjuſt but even void of pretences.

§ 196. Acqueſts of moveables.

The property of moveable commodities belong to the enemy, is required the very moment they come into his power, and if he ſells them to neutral nations, the firſt owner has no right of reclaiming them. But ſuch things muſt be actually and truly in the enemy's power, and carried to a place of ſafety. A foreigner coming into our country buys a portion of the booty juſt taken by a party of the enemy; our men who are in purſuit of this party very juſtly ſeize on this booty, which the foreigner was over precipitate in buying. On this head Grotius

Grotius relates from Thuanus, the inſtance of the town of Lierre, in Brabant, which having been taken and retaken on the ſame day, the booty was reſtored to the inhabitants, becauſe it had not been twenty-four hours in the enemy's hands [a]. This ſpace of twenty-four hours, together with the cuſtom at ſea [b], is an inſtitution of the practitious law of nations, or of cuſtom, or, in fine, of a civil law in ſome ſtates. The natural reaſon of the conduct towards the inhabitants of Lierre is, that the enemy being taken as it were in the fact, and before they had carried off the booty, it was accounted as not having become abſolutely their property; or as loſt to the inhabitants. Thus, at ſea, a ſhip taken by the enemy, while it has not been carried into ſome harbour, or into the midſt of a fleet, may happen to be retaken, and delivered by ſhips of the ſame party; its fate is not decided, nor the owner's property irrecoverably loſt, till the ſhip be in a place of ſafety with regard to the enemy, who has taken it, and entirely in his power. But the ordinances of every ſtate may make other regulations among its citizens [c], both for avoiding diſputes and encouraging ſhips of force to recover merchant ſhips after being taken by the enemy. The juſtice or injuſtice of the cauſe here does not come into account. There would be nothing ſtable among men, no ſafety in trading with nations which are at war, if ſuch a diſtinction could be made between a juſt and unjuſt war, as to attribute lawful effects to the one, which were denied to the other: It would be opening a door to endleſs diſcuſſions and quarrels. This reaſon is of ſuch weight that, on account of it, the effects of a public war, at leaſt with regard to moveables, have been allowed to expeditions,

[a] Grotius de jure bell. & pac. Book III. Cap. VI. Sect. 3. n. 7.

[b] See Grotius ibid. and in the text.

[c] Grotius ibid.

which

which deſerved no other name than robberies, but were carried on by arms in form. When, after the wars of the Engliſh in France, the *grandes compagnies* ranged about Europe, ſacking and pillaging wherever they came, we do not hear that any one claimed the booty which they had carried off and ſold. At preſent it would be in vain to claim a ſhip taken by the Corſairs of Barbary, and ſold to a third party, or retaken from them; though it is very improperly that the pyracies of theſe barbarians can be conſidered as acts of a war in form. We here ſpeak of the external right; the internal right and conſcience doubtleſs require that we ſhould reſtore to a third party the goods we recover from an enemy, who in an unjuſt war had taken them from him; provided he knows theſe things again, and defrays the expences we were at in recovering them [d]. Grotius recites many inſtances of ſovereigns and commanders who have generouſly reſtored ſuch booty, without requiring any thing either for their trouble or expence. But this only regards a recent booty. To find out the proprietors of what had been taken long before, would be ſcarce practicable, and beſides they have relinquiſhed all their right to things which they had no longer any hopes of recovering. This is the common way of thinking with reſpect to captures in war, which are ſoon given up as irrecoverably loſt.

§ 197. Of the acquiſition of immoveables, or of conqueſt.

Immoveables, lands, towns and provinces, &c. paſs under the power of the enemy who makes himſelf maſter of them; but it is only by the treaty of peace, or the entire ſubmiſſion and extinction of the ſtate, to which theſe towns and provinces belonged, that the acquiſition is completed, and the property becomes ſtaple and perfect.

§ 198. How to transfer them validly.

Thus a third party cannot ſafely purchaſe a conquered place or province, till the ſovereign from whom it was

[d] Grotius Lib. III. Cap. XVI.

taken

taken has by a treaty of peace renounced it, or being irrecoverably reduced, has forfeited its ſovereignty; for while the war continues, while the ſovereign has ſtill hopes of recovering his poſſeſſions by arms, is a neutral prince to come and deprive him of ſuch liberty by purchaſing of the conqueror this place or province? The firſt proprietor cannot forfeit his rights by the action of a third perſon, and if the purchaſer is for maintaining his purchaſe, he will find himſelf enaged in a war. Thus the King of Pruſſia put himſelf among the enemies of Sweden, by receiving Stettin from the hands of the King of Poland and the Czar, under the title of ſequeſtration[a]. But when a ſovereign has, by a definitive treaty of peace, ceded a country to the conqueror, he has relinquiſhed all the right he had to it; and it would be an abſurdity were he allowed to claim this country again from a freſh conqueror, who wreſts it from the former, or of any other prince, who has acquired it by money, exchange, or any title whatever.

§ 199. Of the condition on which a conquered town is acquired.

A prince taking a town or province from his enemy, can juſtly acquire over it the ſame rights only as belonged to the ſovereign againſt whom he had taken arms. War authorizes him to poſſeſs himſelf of what belonged to his enemy: if he deprives him of the ſovereignty of a town or province, he acquires it as it is, with all its limitations and modifications. Accordingly care is uſually taken to ſtipulate both, in particular capitulations and treaties of peace, that the towns and countries ceded ſhall retain all their liberties, privileges, and immunities. And why ſhould the conqueror ſuppreſs them on account of his quarrel which he had with the ſovereign of thoſe places? Yet, if the inhabitants have incurred any perſonal guilt towards him by any irregularity, he may, as a penalty,

[a] By the treaty of Schewedt, 6 Oct. 1713.

deprive

deprive them of their rights and privileges. This he may alſo do if the inhabitants have taken up arms againſt him, and thus rendered themſelves his enemies. All that he then owes them is no more than what is due from a humane and equitable conqueror, to his ſubdued enemies. Should he purely and ſimply incorporate them with his former ſtates, they have no cauſe of complaint.

It appears that hitherto I ſpeak of a city or a country which is not ſimply a part of a nation, or which does not fully belong to a ſovereign, but over which this nation or this ſovereign has certain rights; if the conquered town or province was fully and perfectly made part of the demeſne of a nation or ſovereign, it paſſes on the ſame footing into the power of the conqueror. From that time it is united with the new ſtate to which it belongs; if it be a loſer by this change, it can only complain of the fortune of war. Thus a town which made part of a republic or a limited monarchy, and enjoyed a right of ſending deputies to the ſupreme council or to the general aſſembly of the ſtates, muſt never more think of ſuch privileges; they are what the conſtitution of the new ſtate to which it is annexed, does not permit.

§ 200. Of the lands of private perſons.

Formerly in conqueſts even individuals loſt their lands, and it is not at all ſtrange that in the firſt ages of Rome ſuch cuſtom ſhould have prevailed. The wars of that æra were carried on between popular republics and communities. The ſtate poſſeſſed very little, and the quarrel was in reality the common cauſe of all the citizens. But at preſent war is leſs terrible to the ſubject; things are tranſacted with more humanity: It is againſt one ſovereign that another makes war, and not againſt the quiet ſubjects. The conqueror lays his hands on the poſſeſſions of the ſtate, on what belongs to the public, while private perſons are permitted to retain theirs.

They

They ſuffer but indirectly by war; and to them the reſult is that they only change maſters.

§ 201. Of the conqueſt of the whole ſtate.

But if the whole ſtate be conquered, if the nation be ſubdued, in what manner can the victor treat it, without tranſgreſſing the bounds of juſtice? What are his rights over the conqueſt? Some have dared to advance this monſtrous principle, that the conqueror is abſolute maſter of his conqueſt, that he may diſpoſe of it as his property, treat it as he pleaſes, according to the common expreſſion of *treating a ſtate as a conquered country*: And hence they derive one of the ſources of deſpotic government. But enough of thoſe who reduce men to the ſtate of transferable goods, or uſe them like beaſts of burden, who deliver them up as the property or patrimony of another man: let us argue on principles countenanced by reaſon, and becoming humanity. The whole right of the conqueror proceeds from the juſt defence of himſelf (Sect. 3. 26. 28.) which contains the ſupport and proſecution of his rights. Thus when he has totally ſubdued a nation with whom he had been at war, he may without diſpute cauſe juſtice to be done him, with regard to what gave riſe to the war, and require payment for the expence and damage he has ſuſtained; he may, according to the exigency of the caſe, impoſe penalties on it, as an example: he may, ſhould prudence ſo dictate, diſable it from undertaking any pernicious deſigns for the future. But in ſecuring all theſe views, the mildeſt means are to be preferred. We are always to remember, that the law of nature permits no injury to be done to an enemy, unleſs in taking meaſures neceſſary for a juſt defence, and a reaſonable ſecurity. Some princes have only impoſed a tribute on it, others have been ſatisfied with ſtripping it of ſome privileges, diſmembering a province, or keeping it in awe by fortreſſes; others, as their quarrel was only with the

the ſovereign in perſon, have left a nation in the full enjoyment of all its rights, only ſetting a ſovereign over it. But if the conqueror thinks proper to retain the ſovereignty of the vanquiſhed ſtate, and has ſuch a right, the manner in which he is to treat the ſtate ſtill flows from the ſame principles. If the ſovereign be only the juſt object of his complaint, reaſon declares, that by his conqueſts he acquires only ſuch rights as actually belonged to the dethroned ſovereign; and, on the ſubmiſſion of his people, he is to govern it according to the laws of the ſtate. If the people do not voluntarily ſubmit, the ſtate of war ſubſiſts.

A conqueror who has taken arms, not only againſt a ſovereign, but againſt the nation itſelf, whoſe intent was to ſubdue a lawleſs people, and once for all reduce an obſtinate enemy; this conqueror may with juſtice lay burdens on the conquered, both as a compenſation for the expence of the war, and as a penalty. He may, according to the degree of idocility, govern them with firmneſs ane rigour, for diſpiriting and weakening them; and, if neceſſary, keep them ſome time in a ſtate of ſlavery. But this forced condition is to ceaſe when the danger is over, when the conquered are become citizens, for then the right of the conqueror, as to ſeverities, expires; as his defence and ſafety no longer require ſuch extraordinary precautions. In fine, every thing is to be reduced to the rules of a wiſe government, to the duties of a good prince.

When a ſovereign, as pretending to have the abſolute diſpoſal of a people whom he has conquered, is for enſlaving them, he cauſes the ſtate of war to ſubſiſt between this people and him. The Scythians ſaid to Alexander the Great, there is never any friendſhip between the maſter and ſlave. In the midſt of peace the right of war

ſtill ſubſiſts [a]. Should it be ſaid, that in ſuch a caſe there may be peace, and a kind of compact, by which the conqueror grants life, on condition that they acknowledge themſelves his ſlaves: he who ſays ſo, is ignorant that war gives no right to take away the life of an enemy, after being diſarmed and ſubdued (Sect. 140.). But I ſhall decline to debate this principle of juriſprudence with him, let him take it to himſelf; he deſerves ſuch a ſubjection. But men of ſpirit, to whom life is nothing, leſs than nothing, unleſs ſweetened with liberty, will always conceive themſelves at war with that oppreſſor, though on their part the acts are ſuſpended by inability. Let us farther ſay, that if the conqueſt is to be really ſubject to the conquerer, as to its lawful ſovereign, he muſt rule it according to the ends for which civil government is eſtabliſhed: the prince alone uſually occaſions the war, and conſequently the conqueſt. Surely it is enough that an innocent people ſuffer the calamities of war; muſt even peace itſelf become pernicious to it? A generous conqueror will apply himſelf to relieve his new ſubjects, to alleviate their condition; he will think it his indiſpenſible duty. *Conqueſt*, ſays an excellent man, *to clear itſelf with human nature, always leaves an immenſe debt behind it* [b]. Happily found politics, here and every where elſe, coincide with humanity. What fidelity, what aſſiſtance, can be expected from an oppreſſed people? That your conqueſt may be a real addition to your ſtrength, that it may be well affected to you, treat it as a father, as a true ſovereign. I am charmed with the generous anſwer of the ambaſſador from Privernum, who, on being introduced to the Roman ſenate, the conſul ſaid, "If we ſhew you clemency, what ſtreſs may we "lay on the peace you are come to aſk?" The ambaſ-

[a] Inter dominum et ſervum, nulla amicitia eſt, etiam in pace, belli tamen jura ſervantur. Q. Curt. Lib. VII. Cap. VIII.

[b] Monteſquieu, in his ſpirit of laws.

ſador

ſador replied, "If you grant it on reaſonable conditions, "it will be ſafe and permanent, otherwiſe it will not laſt "long." Some took offence at the boldneſs of this ſpeech, but the more ſenſible part approved of the Privernican's anſwer, as having ſpoken like a man, and a freeman. Can it be expected, ſaid theſe wiſe ſenators, that any people, or even private perſons, will continue in a condition with which they are diſſatisfied, longer than while under an invincible neceſſity? If they to whom you give peace receive it voluntarily, it may be relied on: what fidelity can you hope for from thoſe whom you are for reducing to ſlavery? [a] The moſt ſecure dominion, ſaid Camillus, is that which is acceptable even to thoſe over whom it is exerciſed [b]. Such are the rights which the law of nature gives to the conqueror, and the duties which it lays on him; the manner of exerting the one, and fulfilling the other, varies according to circumſtances. In general, he is to conſult the true intereſt of the ſtate, and by ſound policy, reconcile, it as far as poſſible, with that of his conqueſt. He may, in imitation of the Kings of France, unite and incorporate them with his ſtate. This was the way of the Romans, but they proceeded differently, according to caſes and junctures. At a time when Rome ſtood in need of augmentation, ſhe deſtroyed the city of Alba, as a rival; but received the inhabitants into her boſom, and thereby procured herſelf ſo many citizens. Afterwards the conquered cities were left ſtanding, and the freedom of

[a] Quid ſi pænam (inquit conſul) remittimus vobis, qualem nos pacem vobiſcum habituros ſperemus? Si bonam dederitis, inquit, et fidam et perpetuam, ſi malam, haud diuturnam. Tum vero minari, nec id ambigue Privernatum quidam, et illis vocibus ad rebellandum incitari pacatos populos. Pars melior ſenatus ad meliora reſponſa trahere, et dicere, viri, et liberi vocem auditam: aut credi poſſe ullum populum, aut hominem denique in ea conditione cujus eum pæniteat, diutiùs quam neceſſe ſit manſurum? ibi pacem eſſe fidam, ubi voluntarii pacati ſint. Neque eo loco, ubi ſervitutem eſſe velint, fidem ſperandam eſſe. Tit. Liv. Lib. VIII. Cap. XXI.

[b] Certi ut firmiſſimum longi imperium eſt quo obedientes gaudent. Tit. Liv. Lib. VIII. Cap. XIII.

Rome was given to the conquered. Victory could not have been of ſo much advantage to thoſe people as a defeat.

The conqueror may likewiſe ſimply put himſelf in the place of the ſovereign, whom he has diſpoſſeſſed, as the Tartars have done with China. The empire ſubſiſts as it was, except being governed by a new race of ſovereigns.

Laſtly, the conqueror may rule his conqueſt as a ſeparate ſtate, and permit the form of government to remain; but this method is dangerous, it produces no real union of force; it weakens the conqueſt without ſtrengthening the conquered ſtate.

§ 202. To whom the conqueſt belongs

It is aſked to whom the conqueſt belongs; to the prince who has made it, or to the ſtate? This queſtion ought never to have been heard of. Can the ſovereign act as ſuch for any other end than the good of the ſtate? Whoſe are the forces employed in the war, even if he had made the conqueſt at his own expence, out of his own revenue, or his proper and patrimonial eſtates, does he not make uſe of his ſubjects arm? is it not their blood that is ſhed? But even ſuppoſe that he had employed foreign or mercenary troops, does he not expoſe his nation to the enemy's reſentment? does he not draw it into the war, while the advantage ſhall be his only? Is it not for the cauſe of the ſtate, and of the nation, that he takes arms? Therefore all the rights proceeding from it appertain to the nation. If the ſovereign makes war for a cauſe perſonal to himſelf, as to aſcertain a right of ſucceſſion to a foreign ſovereignty, the queſtion is altered. This affair is foreign to the ſtate, but then the nation ſhould be at liberty either to aſſiſt its prince, or not concern itſelf. If he is impowered to make uſe of the national force in ſupport of his perſonal rights, ſuch rights are no longer to be diſtinguiſhed from thoſe of the ſtate. The French law, which annexes to the crown all acquiſitions

ſitions made by the king, ſhould be the law of all nations.

§ 203. Whether we are to ſet at liberty a people whom the enemy had unjuſtly conquered?

We have ſeen (Sect. 196.) that a nation may be obliged, if not externally, yet in conſcience, and by the laws of equity, to reſtore the booty recovered from an enemy to a third party, who had been deprived of it in an unjuſt war. The obligation is more certain and more extenſive, with regard to a people whom our enemy had unjuſtly oppreſſed. For a people thus ſpoiled of its liberty never depart from the hope of recovering it, if not voluntarily incorporated with the conquering ſtate; if it has not freely aſſiſted againſt us in the war, the uſe we are to make of our victory is, not that it ſhall only come under a new maſter, but its chains ſhall be broken. To deliver an oppreſſed people is a noble point of victory, and thus to acquire a faithful friend is a great gain.—The canton of Schwitz having wreſted the county of Glaris from the houſe of Auſtria, reſtored the inhabitants to their former liberties, and on the reception of them into the Helvetic confederacy, Glaris formed the ſixth canton [b].

CHAP. XIV.

Of the Right of Poſtliminium.

§ 204. Definition of the right of poſtliminium.

THE right of poſtliminium is that in virtue of which perſons and things taken by the enemy, are reſtored to their former ſtate, when coming again under the power of the nation to which they belonged,

[b] Hiſtoire de la confederetion Helvetique par M. Wattewlli. Lib. III. under the year 1351.

The

§ 205. Foundation of this right

The ſovereign is obliged to protect the perſon and goods of his ſubjects, and to defend them againſt the enemy; therefore when a ſubject, or any part of his ſubſtance are fallen into the hands of the enemy, ſhould any fortunate event bring them again into the ſovereign's power, it is certainly incumbent on him to reſtore them to their former ſtate; he is to re-eſtabliſh the perſons in all their rights and obligations, to give back the effects to the owners, in a word, to ſettle every thing as they were before they fell into the enemy's hands. The juſtice or injuſtice of the war makes no difference here, not only becauſe, according to the voluntary law of nations, the war, as to its effects, is reputed juſt on both ſides, but likewiſe becauſe war, whether juſt or not, is a national cauſe; and if the ſubjects fighting or ſuffering for it, when fallen themſelves (or their effects) into the enemy's hands, are by ſome fortunate incident returned under the power of their own nation, there is no reaſon why they ſhould not be reſtored to their former condition. It is as if they had never been taken. If the war be juſt they were unjuſtly taken, and thus nothing is more natural than to reſtore them as ſoon as it becomes poſſible. If the war be unjuſt, they are not bound to bear the calamities of more than any other part of the nation. The evil falls on them in being taken; and by their eſcape or releaſe are delivered. Here again it is as if they never had been taken; neither their ſovereign nor the enemy have any particular right over them. The enemy has loſt by one accident what they had gained by another.

§ 206. How it takes place.

Perſons return, and things are recovered, by the right of poſtliminium, when after being taken by the enemy, they come again under the power of their own nation, (Sect. 204.) Thus this right takes place, as ſoon as ſuch perſons or things taken by the enemy fall into the hands of ſoldiers belonging to the ſame nation, or are brought back

back to the army, the camp, their ſovereign's territories, or the places under his command.

§ 207. Whether it takes place among the allies.

They who join with us in a war, make but one party, jointly with us; the cauſe is common, the right one and the ſame; they are conſidered as making but one body with us. Therefore when perſons or things taken by the enemy are retaken by our allies, or our auxiliaries, or in any other manner fall into their hands, this is exactly the ſame thing with regard to right, as if they were come again into our own power, the power of our allies being in this caſe but one and the ſame. The right of poſtliminium therefore takes place in the hands of thoſe who join with us in the war; the perſons and things recovered by them from the enemy, are to be reſtored to their former condition.

But does this right take place in the territories of our allies? Here a diſtinction ariſes, whether theſe allies make one common cauſe with us, whether they are aſſociates in the war. The right of poſtliminium, neceſſarily takes place for us within their territories, no leſs than within our own. For this ſtate is united with ours, and in this war makes one and the ſame party. But if, as in our times is frequently the practice, an ally only furniſhes us the ſuccours ſtipulated in the treaties, without coming to a rupture with our enemy, their two ſtates continuing in their immediate relations to obſerve the peace, then only theſe auxiliaries ſent by him are partakers and aſſociates in the war. His dominions adhere to their neutrality.

§ 208. Of no validity in neutral nations.

Now the right of poſtliminium, is of no force among neutral nations, for the power inclined to remain neuter in a war muſt look on it, as to the effects, equally juſt on both ſides, and conſequently to conſider whatever is taken by either, a lawful acquiſition. To allow in his dominions that one may claim things taken by the other, or to grant him the right of poſtliminium in prejudice to the other,

other, would be to declare in his favour, and depart from the neutrality.

§ 209. What things are recoverable by this right.

Naturally, goods of all kinds are recoverable by the right of poſtliminium, and could they be certainly known again, there is no intrinſic reaſon why moveables ſhould be excepted. Accordingly the ancients, on recovering theſe things from the enemy, have reſtored them to their former owners[a]. But the difficulty of knowing again things of this nature, and the endleſs diſputes which would ſpring from the revendication of them, have in moſt parts introduced a contrary practice. Farther, from the little hopes of recovering effects taken from the enemy, and once carried into a place of ſafety, the former owners are ſuppoſed to have relinquiſhed and given them up. It is therefore that with reaſon, moveables or booty are excepted from the right of poſtliminium, unleſs taken from the enemy immediately after the ſeizure of them; in this caſe it is neither difficult for them to be known again, nor can the proprietor be ſuppoſed to have relinquiſhed them. A cuſtom being once admitted, and well eſtabliſhed, it would be unjuſt to treſpaſs on it. Among the Romans indeed ſlaves were not treated like other moveables; they, by the right of poſtliminium were reſtored to their maſters, even when the reſt of the booty was detained: the reaſon of this is manifeſt, it being always eaſy to know a ſlave again, and to whom he belonged: the owner alſo, as he entertains hopes of recovering him, is not ſuppoſed to have relinquiſhed his right.

§ 210. Of thoſe who cannot return by the right of poſtliminium.

Priſoners of war, who have given their parole; territories and towns, which have ſubmitted to the enemy, who have ſworn or promiſed allegiance to him, cannot of themſelves return to their former condition, by the

[a] See ſeveral inſtances in Grotius. Book III. Chap. XVI. Sect. 2.

right

right of poſtliminium, for faith is to be kept even with enemies (Sect. 174.).

§ 211. They enjoy this right when retaken

But if the ſovereign retakes theſe towns, countries, or priſoners, who had ſurrendered to the enemy, he recovers all his former rights over them, and is to re-eſtabliſh them in their former condition (Sect. 205.) they then enjoy the right of poſtliminium without any breach of their word, or violation of faith. The enemy loſes by arms the right he had gained by them. But concerning priſoners of war, a diſtinction is to be made. If they were entirely free on their parole, it is not only coming again under the power of their nation, which can deliver them; becauſe had they even returned to their home, they would ſtill have been priſoners. The will of him who took them, or his total ſubmiſſion, can alone diſcharge them; but if they have only promiſed not to run away, a promiſe they frequently make to avoid the evils of a priſon, all they are bound to, is that of themſelves, they ſhall not quit the enemy's country, or the place aſſigned for their dwelling; and if the troops of their party ſhould get poſſeſſion of the place where they dwell, they are by the laws of arms releaſed and reſtored to their nation, and to their former ſtate.

§ 212. Whether this right extends to their goods which had been alienated by the enemy?

When a town ſurrendering to the enemy's arms, is retaken by thoſe of its ſovereign, it thereby, as we have juſt ſeen, becomes reſtored to its former condition, and therefore to all its rights. It is aſked whether it thus recovers ſuch of its poſſeſſions, which had been alienated by the enemy, when he becomes maſter of it? Firſt we are to diſtinguiſh between moveable goods, not recoverable by the right of poſtliminium (Sect. 202.) and immoveables. The former belong to the enemy who gets them into his hands, and he may alienate them irretrievably. As for immoveables, let it be remembered, that the acquiſition of a town taken in war, is not full complete till confirmed by a treaty of peace, or the entire ſubmiſſion

ſubmiſſion or deſtruction of the ſtate to which it belonged (Sect. 197.). Till then the ſovereign of that town has hopes of retaking it, or recovering it by a peace. And from the moment it returns into his power, he reſtores it to all its rights (Sect. 205.) and conſequently it recovers all its poſſeſſions, as far as in their nature they are recoverable. Therefore it re-aſſumes its immoveables from the hands of thoſe who were precipitate in purchaſing them. The buying them of him who had not the abſolute diſpoſal of them, was a hazardous bargain; and if they prove loſers, it was what they deliberately expoſed themſelves to. But if this town had been ceded to the enemy by a treaty of peace, or was abſolutely fallen into his power by the ſubmiſſion of the whole ſtate, it has no claim to the right of poſtliminium. And the alienation of any of its poſſeſſions by the conqueror is valid and irretrievable. Should ſome ſubſequent fortunate revolution deliver it from the conqueror's yoke, it can revendicate them. When Alexander made a preſent to the Theſſalians of the ſum due from them to the Thebans (See Sect. 77.) he was ſo abſolutely maſter of the republic of Thebes, that he deſtroyed the city, and ſold the inhabitants.

The ſame deciſions take place with regard to the immoveables of individuals, priſoners, or not, which have been alienated by the enemy while he was maſter of the country. Grotius propoſes the queſtion with reſpect to immoveables, belonging to a priſoner of war in a neutral country[a]. But this queſtion is void by our principles, for a ſovereign taking a priſoner of war, has no other right than to detain him till (Sect. 148. &c.) the end of the war, or till he be ranſomed; and has none on any of his rights, unleſs he can ſeize them. It is impoſſible to produce any natural reaſon why he who has

[a] Lib. III. Cap. IX. Sect. 6.

taken

taken a priſoner can have a right to diſpoſe of any goods or poſſeſſions but thoſe the priſoner has about him.

§ 213. Whether a nation that has been entirely reduced can enjoy the right of poſtliminium.

When a nation, people, or ſtate, has been entirely ſubdued, it is aſked whether a revolution can entitle it to the right of poſtliminium. In order juſtly to anſwer this queſtion, there muſt again be a diſtinction of caſes. If this ſubdued ſtate has not yet acquieſced in its new ſubjection, has not voluntarily ſubmitted, and has only ceaſed to reſiſt from inability; if its victor has not laid aſide the ſword of conqueſt, nor taken up the ſcepter of peace and equity; ſuch a people are not really ſubdued: they are only conquered and oppreſſed, and on being delivered by an ally, they doubtleſs return to their former ſtate (Sect. 207.) Their ally cannot become their conqueror, he is their deliverer, and all the obligation of the party delivered is to reward him. If the latter conqueror, as not being an ally to the ſtate of which we ſpeak, will keep it under his laws, as the purchaſe of victory, he puts himſelf in the caſe of the former, and becomes the enemy of the ſtate which the other had ſubdued. This ſtate may lawfully reſiſt him, and avail itſelf of a favourable opportunity to recover its liberty; if it had been unjuſtly ſubdued, he who reſcues it from the yoke of the oppreſſor ſhould generouſly reſtore it to all its rights (Sect. 203.).

The queſtion changes with regard to a ſtate which has voluntarily ſurrendered to a conqueror. If the people, no longer treated as enemies, but as good ſubjects, have ſubmitted to a lawful government, they henceforth derive under a ſovereign, or they are incorporated with the conquering ſtate; they make part of it, and ſhare its fate. Their former condition is abſolutely effaced; all its relations, all its alliances are extinguiſhed (Book II. Sect. 203.). Whoever then the new conqueror be, that afterwards ſubdues the ſtate to which theſe people are united, they undergo the deſtiny of the former, as the part follows

lows the whole. This has been the practice of nations in all ages; I ſay, even of juſt and equitable nations, eſpecially with regard to an ancient conqueſt. The more moderate beſtow liberty on a people which had but recently ſubmitted, whom they do not conſider as perfectly incorporated, nor well cemented by inclination with the ſtate which conquered them.

If this people ſhake off the yoke and recover their liberty by their own virtue, they regain all their rights, they return to their former ſtate, and foreign nations have no right to determine whether they have withdrawn from a legal authority, or whether they have broke their chains.

Thus the kingdom of Portugal, which had been invaded and ſubdued by Philip II. King of Spain, under pretence of an hereditary right, but in effect from avidity backed by a ſuperior force, after groaning under all the miſeries of tyranny, recovered the independency of its crown, and regained its ancient rights by driving out the Spaniards, and placing the Duke of Braganza on the throne.

§ 214. Of the right of poſtliminium of what is reſtored at the peace.

Provinces, towns, and countries, which the enemy reſtores by the treaty of peace, are certainly entitled to the right of poſtliminium. For the ſovereign in whatever manner he recovers them, is on their returning under his power to reſtore them to their former ſtate. The enemy in giving back a town at the peace, renounces the right acquired by his arms. It is as if he had never taken it. In this there is no reaſon, which exempts the ſovereign from replacing it in all the rights of its former condition.

§ 215. And with reſpect to things ceded to the enemy.

Whatever is ceded to the enemy by a treaty of peace, is truly and fully alienated. It has no longer an affinity with the right of poſtliminium, unleſs the treaty of peace be broken and annulled.

And

§ 216. The right of poſtliminium does not take place after a peace.

And as things not mentioned in the treaty of peace, remain in the condition wherein they happen to be at the time of its concluſion, and are tacitly ceded on both ſides to the poſſeſſor, it may be ſaid in general, that the right of poſtliminium is ſecluded after the ſignature of the peace. This right entirely relates to the ſtate of war.

§ 217. Why always in force for priſoners.

Yet, and for this very reaſon, there is always an exception to be made here, in favour of priſoners of war. Their ſovereign on a peace is to redeliver them (Sect. 154.) If he cannot, if the fate of arms neceſſitates him to accept of hard and unjuſt conditions, the enemy who ſhould have releaſed the priſoners when the war is at an end, having no longer any thing to fear from them (Sect. 150, 153.) continues the ſtate of war by detaining them in captivity, but eſpecially if he reduces them to ſlavery (Sect. 152.) Therefore they have a right when an opportunity offers, to aſſert their liberty, to eſcape from his injuſtice, and return into their country equally as in war time, ſince, with regard to them, the war continues. And then the ſovereign, from his obligation to protect them, is to reſtore them to their former condition (Sect. 205.).

§ 218. They are free even by eſcaping into a neutral country.

Farther, ſuch priſoners who have been detained ſince the peace, without any juſt reaſon, are free, if after their eſcape from priſon they can but reach a neutral country. For enemies are not to be purſued and ſeized in a neutral country (Sect. 132.). And whoever detains an innocent priſoner after the peace, continues his enemy. This rule ſhould, and does actually, abtain among nations who reject enſlaving priſoners of war.

§ 219. How the rights and obligations of priſoners ſubſiſt.

It is ſufficiently clear from the premiſes, that priſoners are to be conſidered as citizens, who one day may return into their country, and on their return the ſovereign is obliged to reſtore them to their former ſtate, whence it evidently follows that the right of thoſe priſoners,

ſoners, and the obligations to which they are bound, with the rights of others over them, ſtill ſubſiſt entire, and only ſuffer a ſuſpenſion in the exerciſe of part of them during the impriſonment.

§ 220. Of the will of a priſoner of war.

The priſoner of war therefore retains a right to diſpoſe of his poſſeſſions, particularly in caſe of death; and as there is nothing in the ſtate of captivity which can in this reſpect vacate the exerciſe of his right, the will of a priſoner of war is of force in his own country, unleſs annulled by ſome inherent defect.

§ 221. Of marriage.

Among nations, where marriage is indiſſoluble, unleſs diſſolved by the interpreters of the law, the captivity of one of the parties does not affect the tie, and on his return home he by poſtliminium is again entitled to all his matrimonial rights.

§ 222. Of what is eſtabliſhed by the right of poſtliminium in treaties or cuſtoms.

We do not here enter into a detail of what by the civil laws of nations is ſettled regarding the right of poſtliminium, obſerving only that theſe particular regulations bind only the ſubjects of the ſtate alone, without being of any force againſt foreigners. Neither do we here examine what is adjuſted by treaties; theſe particular conventions eſtabliſh a fictitious right, which relates only to the contracting parties. Cuſtoms confirmed by long and conſtant uſe are obligatory on thoſe people who have given a tacit conſent to them, and are to be regarded, when not contrary to the law of nature; but thoſe which offend againſt that ſacred law are defective and void; every nation being ſo far from conforming to ſuch cuſtoms, that it is obliged to endeavour the abolition of them. Among the Romans the right of poſtliminium was of force, even in profound peace, relatively to nations with which Rome had neither connections of friendſhip, right of hoſpitality, nor alliance[a].

[a] Digeſt. Lib. XLIX. de capt. & poſtlim. Leg. V. Sect. 2.

This

This was becauſe thoſe people were conſidered in ſome meaſure as enemies. Milder manners have almoſt everywhere ſuppreſſed this remainder of barbariſm.

CHAP. XV.

Of the Rights of Private Perſons in War.

§ 223. Subjects cannot commit hoſtilities without the ſovereign's order.

THE right of making war, as we have ſhewn in the firſt chapter of this book, belongs alone to the ſovereign power; which not only decides whether it be proper to undertake the war, and declare it, but likewiſe directs all the operations, as circumſtances of the utmoſt importance to the welfare of the ſtate. Therefore ſubjects cannot act herein of themſelves, and without the ſovereign's order they are not to commit any hoſtility. Self-defence however is by no means contained within this term of hoſtility. A ſubject may repel the violence of a fellow-citizen when the magiſtrate's aſſiſtance is not at hand, and with much greater right may he defend himſelf againſt the unexpected attacks of foreigners.

§ 224. This order may be general or particular.

The ſovereign's order commanding acts of hoſtility, and giving a right to commit them, is either general or particular. The declaration commanding all ſubjects to *attack the ſubjects of the enemy*, carries with it a general order. The generals, the officers, the ſoldiers, the partizans, and thoſe who fit out private ſhips of war, having all commiſſions from the ſovereign, make war by virtue of a particular order.

§ 225. Source of the neceſſity of this order.

But if ſubjects ſtand in need of the ſovereign's order to make war, it is only in virtue of the laws eſſential to every political ſociety, and not as the reſult of any obligation

gation relative to the enemy. For a nation taking up arms againſt another, from that inſtant declares itſelf an enemy to all the individuals of the latter, and authorizes them to treat it as ſuch. What right could it have to complain of hoſtilities committed by private perſons, without their ſuperior's order? The right therefore we ſpeak of relates to the general public law, rather than to the law of nations, properly ſo called, or the principles of the reciprocal obligations of nations.

§ 226. Why the right of nations ſhould have adopted this rule.

If the law of nations be conſidered only in itſelf with regard to a rupture between two nations, all the ſubjects of the one may commit hoſtilities againſt thoſe of the other, and do them all the damages authorized by a ſtate of war. But ſhould two nations thus encounter each other with the whole collected weight of their force, war would become much more bloody and deſtructive, it could ſcarce terminate but by the total deſtruction of one of the parties, which the example of the ancient wars abundantly prove. If we here call to mind the firſt wars of Rome with the neighbouring popular republics, we ſhall have reaſon to congratulate Europe on the contrary practice, now become cuſtomary among nations eſpecially thoſe which keep regular forces or a body of militia. The troops alone carry on the war, while the remainder peaceably follow their callings. And the neceſſity of a particular order is ſo thoroughly eſtabliſhed, that even after a declaration of war between two nations, if the peaſants of themſelves commit any hoſtilities, the enemy inſtead of ſparing them, hangs them up as ſo many robbers or banditti. This is the caſe with private ſhips of war: it is only in virtue of a commiſſion granted by the ſovereign or his admiralty, that they are entitled to be treated like priſoners taken in a formal war.

§ 227. Preciſe meaning of the order.

In the declarations of war, however, the ancient form is ſtill retained, by which all the ſubjects are ordered not only to

to break off all intercourſe with the enemy, but to *attack them*. Cuſtom interprets this general order. It actually authorizes, nay even obliges all ſubjects, of whatever rank, to ſecure the perſons and things belonging to the enemy, when they fall into their hands; but it does not invite them to undertake any offenſive expedition without a commiſſion or particular order.

§ 228. What private perſons may undertake, preſuming on the ſovereign's will.

There are notwithſtanding occaſions when the ſubjects may reaſonably ſuppoſe the ſovereign's will, and act in conſequence of his tacit commands. Thus though the operations of war are by cuſtom generally reſigned to the troops, if the townſmen of a ſtrong place, taken by the enemy, have not promiſed or ſworn ſubmiſſion to him and a favourable opportunity offers itſelf of ſurpriſing the garriſon, and recovering the place for their ſovereign, they may confidently preſume that the prince will approve of this ſpirited enterpriſe. And who will cenſure it? Indeed ſhould the townſmen miſcarry, they muſt expect very ſevere treatment from the enemy: But this does not prove the enterpriſe to be unjuſt or contrary to the law of war. The enemy makes uſe of his right, of the right of arms, by which he is authoriſed in a certain degree to make uſe of terror, that the ſubjects of the ſovereign with whom he is at war, may not be willing to venture on ſuch bold undertakings, the ſucceſs of which might prove fatal to them. No longer ago than the laſt war the inhabitants of Genoa of themſelves ſuddenly ran to arms, and drove the Auſtrians out of the city: and the republic celebrates an annual commemoration of that event by which it recovered its liberty.

§ 229. Of perſons fitting out private ſhips of war,

Perſons fitting out ſhips to cruiſe on the enemy, in recompenſe of their diſburſements and the riſque they run, acquire the property of the capture, but they acquire it by grants from the ſovereign, who iſſues out commiſſions

to them. The ſovereign either gives up to them the whole capture or a part. This depends on the contract made between them. Subjects are not obliged ſcrupulouſly to weigh the juſtice of the war, which indeed they are not always able to obtain a juſt knowledge of, and in caſe of doubt, they are to rely on the ſovereign's judgment (Sect. 187.); there is no doubt but they may with a ſafe conſcience ſerve their country by fitting out privateers, unleſs the war be evidently unjuſt. But on the contrary, foreigners taking commiſſions from a prince, to pray on a nation abſolutely innocent with reſpect to them, are guilty of an infamous practice. The thirſt of gold is their only inducement, and however their commiſſion may aſſure them of impunity, it cannot wash away their execrable guilt; they alone are excuſeable who thus aſſiſt a nation of which the cauſe is indubitably juſt, and who have taken arms only to defend themſelves from oppreſſion. They would even deſerve praiſe, if the hatred of oppreſſion and love of juſtice, rather than the deſire of riches, actuated them to generous efforts, and to expoſe their lives or fortunes to the hazards of war.

230. Of volunteers.

The noble view of acquiring inſtruction in the art of war, and becoming more capable of ſerving our country, has introduced a method of ſerving as volunteers even in foreign armies, and the cuſtom is doubtleſs juſtified by the ſublimity of the motive. Volunteers taken by the enemy are treated as if part of the army in which they fight. Nothing can be more reaſonable: they in fact unite themſelves to this army, they ſupport the ſame cauſe, no matter whether it be from any obligation or of free-will.

231. What ſoldiers and ſubalterns may do.

Soldiers can undertake nothing without the order, either expreſſed or tacit, of their officers. Obedience and execution are their province. They are not to act from their own opinion; they are only inſtruments in the hands

hands of their commanders. Let it be remembered here, that by a tacit order, I mean the ſubſtance of what is included in an expreſs order, or in the functions committed to us by a ſuperior, and what is ſaid of ſoldiers muſt alſo be underſtood of officers, and of all who have any ſubaltern command. Thus with reſpect to things, the care of which is not committed to them, they may both be compared to mere private perſons, who are to undertake nothing without order. The obligation of the military is ſtill more ſtrict, as the laws of war expreſsly forbid acting without order; and this diſcipline is ſo neceſſary that it ſcarce leaves any thing to preſumption. In war an enterpriſe of a very advantageous appearance, where the ſucceſs is almoſt certain, may yet be attended by the moſt fatal conſequences. It would be dangerous to leave it to the judgments of ſubalterns, who cannot know all the general's views, and who want his experience and penetration: it is not to be ſuppoſed that he intends to let them act of themſelves. To fight without command is almoſt always conſidered in a ſoldier as fighting againſt command, or againſt the prohibition. Nor is there hardly any caſe (that of ſelf-defence excepted) wherein ſoldiers and ſubalterns may act without order. Here the order may be ſafely preſumed, or rather the right of ſelf-defence naturally belongs to every one, and ſtands in no need of permiſſion. During the ſiege of Prague, in the laſt war, a body of French grenadiers made a ſally without orders or officers, poſſeſſed themſelves of a battery, nailed up part of the cannon, and brought away the remainder into the city. This the Roman ſeverity would have puniſhed with death, according to the famous inſtance of the conſul Manlius [a] who pronounced ſentence on his ſon, though victorious, for fighting without order. But

[a] Tit. Liv. Lib. VIII. Cap. VII.

the difference of times and manners obliges a general to moderate ſuch ſeverity. Marſhal Beliſle reprimanded publicly thoſe brave grenadiers, but ſecretly diſtributed among them ſome money, in reward for their courage and good inclination. At another famous ſiege in the ſame war, that of Coni, the ſoldiers of ſome battalions, who were lodged in the moats, made a vigorous ſally while their officers were abſent, which was attended with great ſucceſs. Baron Leutrum was obliged to pardon this fault, that he might not damp an ardor in which the ſafety of the place conſiſted; however, as far as poſſible, this inordinate impetuoſity ſhould be checked, as it may be of fatal conſequence. Avidius Caſſius puniſhed, capitally, ſome officers of his army, who having no order, with a handful of men ſurpriſed and cut to pieces a body of three thouſand. This rigour he juſtified by ſaying, that *there might have been an ambuſcade: Dicens evenire potuiſſe ut eſſent inſidiæ, &c.* [b]

§ 232. Whether a ſtate is to indemnify ſubjects for damages ſuſtained in war?

Is the ſtate to make good to private Perſons the damages ſuſtained in war? We may ſee in Grotius that authors are divided on this queſtion. Here two kinds of damages are to be diſtinguiſhed; thoſe done by the ſtate or ſovereign, and thoſe done by the enemy. Of the firſt kind, ſome are done voluntarily and by precaution, as when a field, a houſe, or garden, belonging to a private perſon, is made uſe of for building the rampart of a town, or ſome other piece of fortification; when his ſtanding corn or his ſtore-houſes are deſtroyed to prevent their being of uſe to the enemy. Such damages are to be made good to the owner, who ſhould bear only his quota; but other damages are cauſed by inevitable neceſſity; as for inſtance, the havoc done by the artillery

[b] Volcatius Gallican, cited by Grotius, Book III. Chap. XVIII. Sect. 6. Note 6.

in retaking a town from the enemy. Theſe are accidents, they are calamities ariſing from fortune. The ſovereign, if the ſtate of his affairs permit, is to ſhew an equitable regard for the ſufferer; but no action lies againſt the ſtate for misfortunes of this nature, for loſſes which it has not occaſioned willingly, but through neceſſity and fortuitouſly, and in the exerciſe of its rights. The ſame may be ſaid of damages cauſed by the enemy. All the ſubjects are expoſed to ſuch damages, and unhappy is his lot on whom they fall. In a ſociety this may be hazarded with reſpect to ſubſtance and effects, as life is alſo riſqued. Was the ſtate ſtrictly to indemnify all ſuch who ſuffer in theſe caſes, the public finances would be ſoon exhauſted. Every one muſt contribute his ſhare in due proportion, which would be impracticable. Beſides theſe indemnifications would be liable to a thouſand abuſes, and there would be no end of the particulars; it is therefore to be ſuppoſed that no ſuch thing was ever meant by thoſe who formed a ſociety.

But it is highly conſentaneous to the duties of the ſtate and the ſovereign, and conſequently equitable, nay, very juſt to relieve, as far as poſſible, thoſe unhappy ſufferers who have been ruined by the deſolation of war, as likewiſe to take care of a family whoſe head and ſupport has loſt his life for the ſervice of the ſtate. There are many debts ſacred to him who knows his duty, though no action can be brought againſt him.

CHAP.

CHAP. XVI.

Of ſeveral Conventions made during the Courſe of the War.

§ 233. Of a truce, and ſuſpenſion of arms.

WAR would become too cruel and deſtructive, were all intercourſe between enemies abſolutely deſtroyed. There ſtill ſubſiſt, according to Grotius's obſervation [b], commerces of war, as Virgil [c] and Tacitus [d] terms them. The occurrences and events of war lay enemies under the neceſſity of entering into ſeveral conventions. What we have already ſaid in general of the faith to be kept between enemies, excuſes us from proving here the obligation of faithfully acting up to conventions made in war; it only therefore remains to explain the nature of them. Sometimes it is agreed to ſuſpend hoſtilities for a certain time; and if this convention be only for a very ſhort time, or for any place particularly, it is called a ceſſation or ſuſpenſion of arms. Such are thoſe made for burying the dead, after an aſſault, or after a battle, and for a parley, or a conference between the generals of both ſides. If the agreement be for any length of time, and eſpecially if general, it is more particularly diſtinguiſhed by the appellation of a truce. Many uſe theſe words indiſcriminately.

§ 234. Does not terminate the war.

The truce or ſuſpenſion of arms does not terminate the war; it only ſuſpends the operations.

§ 235. A truce is either partiular or univerſal.

A truce is either particular or univerſal. By the former, hoſtilities ceaſe only in certain places, as between

[b] Lib. III. Cap. XXI. Sect. 1.
[c] ——— belli commercia Turnus ſuſtulit iſta prior. Æneid. X. v. 530.
[d] Ann. Lib. XIV. Cap. 33.

a town

a town and the army beſieging it. By the latter, they are to ceaſe generally, and in all places between the belligerent powers. Particular truces may alſo admit of a diſtinction with regard to the acts of hoſtility, or to the perſons; that is, it may be agreed to abſtain for a time from certain hoſtilities, or two armies may mutually conclude a truce or ſuſpenſion of arms, without reſpect to place.

§ 236. A general truce for many years.

A general truce made for many years, differs from a peace in little elſe than in leaving the original queſtion of the war undecided, as they found it. Two nations tired of war, and not agreeing on the ſubject of their difference, have recourſe to this kind of compact. Thus between Chriſtians and Turks, inſtead of a peace, only long truces have been uſually made; ſometimes from a falſe ſpirit of religion, and ſometimes neither being willing reciprocally to acknowledge each other as lawful maſters of their reſpective poſſeſſions.

§ 237. By whom theſe agreements may be concluded.

It is neceſſary to the validity of an agreement, that it be made with a ſufficient power; every thing done in war is by the authority of the ſovereign, who alone has the right both of undertaking the war, and directing the operations (Sect. 4.). But from the impoſſibility of executing every thing by himſelf, there is a neceſſity of communicating part of his power to miniſters and officers. It is aſked, what are the things of which the ſovereign reſerves the diſpoſal to himſelf, and which he is naturally thought to intruſt to the miniſters of his will, to the generals, and other military officers? We have above (Book II. Sect. 207.) laid down, and explained the principle, which is to be here a general rule. Without a ſpecial mandate from the ſovereign, the perſon commanding in his name is held inveſted with all the neceſſary powers for the reaſonable and ſalutary exerciſe of his functions, for every thing which naturally follows from his commiſſion. The remainder is reſerved

ſerved to the ſovereign, who is not ſuppoſed to communicate more of his power than is neceſſary for the good of his affairs. According to this rule, a general truce can only be concluded by the ſovereign himſelf, or by him to whom he has delegated ſuch a power. For that a general ſhould be inveſted with an authority of ſuch extent, is not neceſſary to the ſucceſs of his operations; it would exceed the limits of his functions, which are to direct the operations of war, wherein he has the command, and not to regulate the concerns of the ſtate. To conclude, a general truce is of ſuch importance, that the ſovereign is always thought to have reſerved it to himſelf. So large a power is granted only to a viceroy or governor of a diſtant country, for the territories under him. If the truce be for years, it is natural to ſuppoſe the ſovereign's ratification neceſſary. The conſuls and other Roman commanders might grant general truces for the time of their commiſſion; but if this term was conſiderable, or the truce made for a longer time, it required the ratification of the ſenate and people. Even a particular truce, when for a long time, ſeems alſo to exceed the ordinary power of a general; and he cannot conclude it but under a reſerve of the ratification.

But as for particular truces made for a ſhort time, it is often neceſſary, and almoſt always proper, that the general ſhould have a power of concluding them. *Neceſſary*, when there is no waiting the prince's conſent: *proper*, on occaſions, when the truce only can tend to ſave the ſhedding of human blood, and is for the common advantage of the contracting parties. Therefore, with ſuch a power the general or commander in chief is naturally ſuppoſed to be inveſted. Thus the governor of a place, and the general beſieging it, may agree on a ceſſation of arms, for burying the dead, or for coming to a parley; they may even ſettle a truce for ſome months,

on

on condition that the place, if not relieved within that time, ſhall ſurrender. Conventions of this kind ſoften the evils of war, and probably can be of no detriment to any one.

§ 238. The ſovereign's faith engaged in them.

All theſe truces and ſuſpenſions of arms are concluded by the authority of the ſovereign, who to ſome conſents in his own immediate perſon, and to others through the miniſtry of his generals and officers. They bind his faith, and he is to ſee them obſerved.

§ 239. When the truce begins its obligation.

The truce binds the contracting parties, from the moment of its being concluded, but cannot have the force of a law with regard to ſubjects on both ſides, till it has been ſolemnly proclaimed: and as an unknown law carries no obligation with it, the truce does not bind the ſubjects, but as it becomes duly notified to them. So that if, before any certain knowledge could reach them, they commit any thing contrary to it, any hoſtility, it is not puniſhable. But the ſovereign, from a regard to his promiſes, is obliged to cauſe the prizes taken ſince the moment when the truce ſhould have begun, to be reſtored. Subjects who for want of a previous knowledge have not obſerved it, are bound to no compenſation, any more than the ſovereign who could not ſignify it to them ſooner: it is an accident without any fault of his, or theirs. A ſhip being on the open ſeas at the time of publiſhing the truce, meets with a ſhip of the enemy, and ſinks her: as there is no guilt in this caſe, ſhe is not liable to pay any damage. If ſhe has made a capture of the veſſel, all the obligation ſhe lies under is to reſtore it, as not retainable by the truce.

But any, by their own fault, not ignorant of the truce, would be bound to make good the damage committed againſt the party. A ſimple and eſpecially a ſlight fault may in ſome meaſure eſcape puniſhment, and doubtleſs it does not deſerve to ſuffer equally with fraud; but againſt the reparation of the damage it is no diſpenſation.

For

For avoiding as much as poſſible all difficulty, ſovereigns in truces, as in treaties of peace, uſually fix terms for the ceſſation of hoſtilities, according to the ſituation and diſtance of places.

§ 240. Publication of the truce.

Since a truce cannot bind ſubjects, unleſs known to them; it is to be ſolemnly publiſhed in all places where it is intended it ſhould be obſerved.

§ 241. Of ſubjects contravening the truce.

Should ſubjects, whether private or military, offend againſt the truce, this is no violation of public faith, nor is the truce thereby broken; but the delinquents ſhould be compelled to an ample compenſation of the damage, or ſeverely puniſhed. Should a ſovereign refuſe juſtice on the complaints of the party injured, he thereby becomes neceſſary to the treſpaſs, and violates the treaty.

§ 242. Violation of the truce.

If one of the contracting parties, or any perſon by his order, or with his conſent only, commit any act contrary to the truce, it is an injury to the contracting party; the truce is diſſolved, and the party offended is entitled to take up arms, not only for renewing the operations of the war, but alſo for revenging the recent injury offered it.

§ 243. Of the caſe when a penalty has been ſettled on the infractor.

Sometimes a penalty on the infractor of the truce is reciprocally ſtipulated, and then the truce is not immediately broken on the firſt infraction; if the party offending ſubmits to the penalty, and repairs the damage, the truce ſubſiſts, and the party offended has nothing farther to claim. If an alternative has been ſettled, that in caſe of an infraction the delinquent ſhall ſuffer a certain penalty, or the truce be broken, the party injured may chuſe whether he will demand the penalty, or make uſe of his right to take up arms again. For were it at the option of the infractor, the ſtipulation of the alternative would have been fruitleſs, ſince by refuſing to comply with the penalty ſimply ſtipulated, he breaks the compact, and thereby gives the injured party a right to take

up

up arms again: beſides, in clauſes of ſecurity like this, the alternative is not ſuppoſed to be in favour of him who fails in his engagements, and it would be abſurd to ſuppoſe that he reſerves to himſelf the advantage of breaking it by his infraction rather than undergoing the penalty. He might as well break it at once openly. The penal clauſe is appointed only to ſecure the truce from being ſo eaſily broken, and can be placed with the alternative, only that a right may be left to the injured party of breaking a compact, if he thinks fit, in which from the behaviour of the enemy he ſees little ſecurity.

§ 244. Of the time of the truce.

It is neceſſary that the time of the truce be well ſpecified, to prevent any doubt or diſpute from the moment of its beginning to its period. By the words *incluſively* and *excluſively*, all ambiguity which may happen to be in the convention, with regard to the two terms of the truce, its beginning and end, will be avoided: for inſtance, if it be ſaid that the truce ſhall laſt from the firſt of March incluſively, until the fifteenth of April alſo incluſively, there can remain no doubt; whereas had it been only ſaid from the firſt of March until the fifteenth of April, it might be diſputed whether thoſe two days mentioned as the initial and final terms of the truce, were comprehended in the treaty or not, and indeed authors are divided as to this point. As to the firſt of thoſe two days, it ſeems beyond all queſtion to be comprized within the truce; for if it be agreed that there ſhall be a truce from the firſt of March, this naturally means that hoſtilities ſhall ceaſe from the firſt of March; as to the latter day, there is ſomething more of doubt, the expreſſion *until* ſeeming to ſeparate it from the time of the armiſtice. And a truce as ſaving blood is without doubt a point to be regarded, and perhaps the ſafeſt way is to include in it the very day of the term: the circumſtances may alſo be of uſe for determining the meaning,

but

but it is very wrong not to remove all ambiguity when it may be avoided only with a word or two more.

The word *day* in national conventions, is to be underſtood of a natural day, ſince it is in this meaning that a day is the common meaſure among nations. The computation by civil days owes its origin to the civil law of every people, and varies according to countries. The natural day begins at ſun-riſing, and laſts twenty-four hours, being the diurnal revolution of the ſun: therefore if a truce of an hundred days be agreed on to begin on the firſt of March, the truce begins at ſun-riſing on the ſame day, and is to continue an hundred days of twenty-four hours each? but as the ſun throughout the whole year does not riſe at the ſame hour, for avoiding all chicanery unworthy of that candour which ſhould prevail in theſe kind of conventions, the truce muſt certainly be underſtood to end as it began, at the riſing of the ſun. The term of a day is meant from one ſun to the other, without any prevaricating or ſtanding out for a few moments in its riſing. He who having made a truce for an hundred days, beginning on the twenty-firſt of June, when the ſun riſes about four o'clock, ſhould on the day the truce is to end, take arms at that very hour before the ſun riſe, would certainly be conſidered as guilty of a mean and unjuſtifiable chicanery.

If no term has been ſpecified for the commencement of the truce, as it binds the contracting parties immediately on its concluſion (Sect. 239.) it concerns them to cauſe it to be publiſhed immediately, in order to the obſervance of it, for it becomes binding on the ſubjects only from the time of its proper publication (Sect. ibid.) and it begins to take effect only from the moment of the firſt publication, unleſs the agreement be otherwiſe.

§ 245. Of the effects of a truce; what is allowed or not during the continuation.

The general effect of a truce is that all hoſtilities ſhall abſolutely ceaſe, and for avoiding any diſpute on what may be termed ſuch, the general rule is: That each, during

during the truce, may within his own territories, and in the places where he is maſter, do whatever he had a right to do in time of full peace. Thus a truce does not hinder a prince from levying ſoldiers, aſſembling an army in his dominions, marching troops thither, and even calling in auxiliaries, and repairing the fortifications of a place, which at that time is not beſieged; as he has a right to do all theſe things in time of peace, the truce does not tie up his hands. Can it be ſuppoſed that in ſuch a compact he means to debar himſelf from executing things which the continuation of hoſtilities could not prevent him from doing?

1. Rule, each may do among themſelves what it has a right of doing in full peace.

§ 246. But to make uſe of the ceſſation of arms for ſafely executing things detrimental to the enemy, and not to be ſafely undertaken amidſt hoſtilities, is circumventing and deceiving the enemy with whom the compact has been made: it is a breach of the truce. By this ſecond general rule we may ſolve ſeveral particular caſes.

Rule 2. Advantage is not to be taken of doing what could not be done during the hoſtilities.

§ 247. The truce concluded between the governor of a place and the general beſieging it, deprives both of the liberty of continuing their works; with regard to the latter this is manifeſt, his works being thoſe of hoſtility; but the governor alſo cannot avail himſelf of the armiſtice for repairing the breaches, raiſing new fortifications; the artillery of the beſiegers does not allow him to carry on ſuch works with impunity during the courſe of hoſtilities, therefore it would be detrimental to them that he ſhould employ the truce in this manner, and they are under no obligation to be ſo far impoſed on. They will, and very juſtly do, conſider ſuch proceedings as a breach of the truce. But the ceſſation of arms does not hinder the governor from continuing within his town ſuch works, to which the fire or attacks of the enemy were no obſtacle. At the laſt ſiege of Tournay, after the ſurrender of the place, an armiſtice was agreed on; and the governor in the mean time permitted the French

For inſtance, to continue the works of a ſiege or repair breaches.

to

to make their diſpoſitions againſt the citadel, carry on their works, and raiſe batteries, becauſe on his ſide the governor was clearing away the rubbiſh with which the blowing up of a magazine had filled the citadel, and was erecting batteries on the ramparts. But all this he might have carried on with little or no danger, had the operations of the ſiege began, whereas for the French to have carried on their works with ſuch expedition to have made their approaches, and erect batteries, muſt have coſt a great many men. So that there was no parity, and on this footing the truce was entirely in favour of the beſiegers: accordingly they were maſters of the citadel a fortnight before they probably would have been.

§ 248. Or to introduce ſuccours.

If the truce be concluded either for ſettling the conditions of the capitulation, or to wait for the orders of the reſpective ſovereigns, the beſieged governor cannot make uſe of it for getting any ſuccours or ſtores into the place. This would be an abuſe of the armiſtice, and deceiving the enemy, which is contrary to candor. The meaning of ſuch a compact manifeſtly is, that all things ſhall remain as they were at the moment of its concluſion.

§ 249. Diſtinction of a particular caſe.

But this is not to he extended to a ceſſation of arms agreed on for ſome particular circumſtance, as burying the dead. This is interpreted according to its object. There firing ceaſes every where or only at one attack, as ſtipulated, that each party may freely carry off their dead, and during this intermiſſion of the fire no works are to be carried on, which were oppoſed; this would be making an ill uſe of the armiſtice, conſequently would be a breach of it. But it is very allowable for a governor, during a ſuſpenſion of arms, ſilently to procure any reinforcement through a paſſage remote from the attack. If the beſieger be lulled by ſuch an armiſtice to abate his vigilance,

vigilance, he muſt ſtand to the conſequence. The armiſtice of itſelf does not facilitate the entrance of ſuch ſuccours.

§ 250. Of an army withdrawing during a ſuſpenſion of arms.

Likewiſe if an army, in a bad poſition, after a battle, propoſes and concludes an armiſtice, for burying the dead, it cannot pretend to extricate itſelf in ſight of the enemy, during the ſuſpenſion, and march off without moleſtation. This would be availing itſelf of the compact for executing what otherwiſe it could not have done. This would be laying a ſnare, and conventions cannot be ſnares; ſo that on a motion to quit the diſadvantageous ſtations, the enemy may juſtly obſtruct it; but ſhould this army ſilently file off in the rear, and thus reach a ſafer poſt; it would be no breach of faith. All implied by a ſuſpenſion of arms for burial of the dead, is that neither ſide ſhall attack whilſt this office of humanity is performing. The enemy can only blame its own remiſſneſs; he ſhould have ſtipulated that, during the ceſſation of arms, each was to remain in his poſt; or ſhould have kept a good watch, and on perceiving the army's deſign, he might lawfully have oppoſed it. To propoſe a ceſſation of arms for a particular object, with a view of lulling the enemy aſleep, and covering a deſign of retreating, is a ſtratagem entirely innocent.

But if the truce be not made for ſome particular object only, we cannot honourably avail ourſelves of it for taking any advantage, as ſecuring ſome important poſt, advancing into the enemy's country. The latter ſtep would indeed be a violation of the truce, for to advance into the enemy's country is an act of hoſtility.

§ 251. Rule 3. Nothing to undertake in conteſted places, but every thing to be left as it was.

Now, as a truce ſuſpends hoſtilities without putting an end to the war, all things (while the truce continues) in the places conteſted, of which the poſſeſſion is diſputed, are to be left as they were, and nothing muſt be undertaken therein to the detriment of the enemy. This is a third general rule.

When

§ 252. Of places quitted or neglected by the enemy.

When the enemy withdraws his troops from a place, and abſolutely quits it, he does not intend to keep poſſeſſion of it any longer, and in this caſe it is entirely conſiſtent with the truce to occupy it. But if by any ſign it appears that a port, an open town, or a village, is not relinquiſhed by the enemy, and that though he neglects it, he maintains ſtill his rights and claims to it, the truce forbids any invaſion of it. To take away from the enemy what he is diſpoſed to retain, is an act of hoſtility.

§ 253. Subjects inclined to revolt againſt their prince not to be entertained.

It is alſo a manifeſt hoſtility to receive towns or provinces inclined to withdraw from the ſovereignty of the enemy, and give themſelves up to us.

§ 254. Much leſs to be ſolicited to treaſon.

And by far more unlawful, during the truce, to inſtigate the ſubjects of the enemy to revolt, or to practiſe upon the fidelity of his governors and garriſons. Theſe are not only acts of hoſtility, but of odious hoſtilities (Sect. 180.). As for deſerters and fugitives, they may be received during the truce, for they are received even in full peace, when there is no treaty to the contrary: and had there been ſuch a treaty, the effect was annulled, or at laſt ſuſpended by the war, which ſince happened.

§ 255. Perſons or effects of enemies not to be ſeized during the truce.

To ſeize perſons or things belonging to the enemy, without cauſe given for ſome particular fault, is an act of hoſtility, and conſequently not allowable during a truce.

§ 256. Of the right of poſtliminy during the truce.

Since the right of poſtliminy is founded only on the ſtate of war (Chap. XIV. of this Book) it cannot take place during the truce, which ſuſpends all the acts of war, and leaves every thing as they were; priſoners themſelves cannot then withdraw from the power of the enemy in order to recover their former condition, as the enemy has a right of detaining them during the war, and it is only on its concluſion that his right over their liberty expires.

Enemies

§ 257. Intercourſe allowed during a truce.

Enemies may naturally come and go into each others country, during the truce, eſpecially if made for a conſiderable time, equally as in time of peace, hoſtilities being all ſuſpended. But every ſovereign, as he would alſo in time of peace, is at liberty to uſe precaution, that theſe intercourſes may not prove detrimental; there is juſt cauſe for ſuſpecting people with whom he is ſoon to renew the war. At making the truce he may declare that he will admit none of the enemy within his territories.

§ 258. Of perſons detained after the truce by an invincible obſtacle

They who having paſſed into the enemy's country during the truce, and are detained there by ſickneſs or any other inſurmountable obſtacles and thus happen to be there at the expiration of it, may in the ſtrict ſenſe of the law of arms be kept priſoners: it is an accident they might foreſee, and to which they have of their own accord expoſed themſelves; but humanity and generoſity allow them a ſufficient reſpite for departing.

§ 259. Of particular conditions added to truces.

If in the treaty of a truce any thing be excepted from, or added to, what has been now ſaid, it is a particular convention, by which the contracting parties are bound. They are to obſerve what they have promiſed in a valid form; and the obligations reſulting from it form a pactitious right, the detail of which is foreign to the plan of this work.

§ 260. At the expiration of the truce the war is renewed without any freſh declaration.

As the truce only ſuſpends the effects of war (Sect. 233.) at its expiration hoſtilities may recommence, without any freſh declaration of war; for every one previouſly knows that the war will re-aſſume its courſe from the moment of expiration, and the reaſons for the neceſſity of a declaration have no place here (Sect. 51.). A truce made for many years, however very much reſembles peace, and differs from it only in that it leaves the ſubject of the war ſubſiſting. Now, as a long ſpace of time may bring about a great change in circumſtances and diſpoſitions on both ſides, the love of peace ſo becom-

ing in ſovereigns, the care they ſhould take of ſparing their ſubjects blood, and even that of their enemies: ſuch beautiful diſpoſitions, I ſay, ſhould ſeem to require of princes not to take up arms again at the expiration of a truce, in which all military preparatives had been totally laid aſide, without making ſome declaration inviting the enemy to prevent effuſion of blood. The Romans have given us an example of this moderation ſo very commendable: they had only made a truce with the city of *Veii*, and the enemy even renewed hoſtilities without waiting the expiration of the truce, yet at that time the college of the Feciales gave it as their opinion, that ſatisfaction ſhould be demanded, previous to their taking up arms again [a].

§ 261. Of capitulations, and by whom they may be concluded.

The capitulation of places, on ſurrendering, are among the principal conventions made between enemies, during the courſe of the war, they are uſually ſettled between the general of the army beſieging and the governor of the town beſieged, both acting by the authority attributed to their reſpective poſt and commiſſion.

We have elſewhere ſhewn (Book II. Chap. XIV.) the principles of the power committed to ſubaltern officers, with the general rules for judging of them. All this has been now recapitulated in a few words, and applied particularly to generals and other commanders in chief (Sect. 237.). As a general and governor of a place muſt naturally be inveſted with all the powers neceſſary for the exerciſe of their reſpective functions, there is a right of preſuming that they have theſe powers, and that of concluding a capitulation is certainly one of this number, eſpecially when there is no waiting for the ſovereign's orders. A treaty made by them on this head is therefore valid, and binds the ſovereigns, in whoſe

[a] Tit. Liv. Lib. IV. Cap. XXX.

name

name and authority the reſpective commandants have acted.

§ 262. Of clauſes contained in them.

But let it be obſerved, that theſe officers not exceeding their powers ſhould keep punctually within the terms of their functions, and forbear meddling with things which have been committed to them; the attack and defence, the taking or ſurrender of a place, relate only to the poſſeſſion, and not to property and right. The fate of the garriſon is likewiſe concerned in it. Thus commanders may agree about the manner in which the capitulating town ſhall be poſſeſſed; the general beſieging may promiſe that the inhabitants ſhall be ſafe, their religion, franchiſes, and liberty of the place preſerved, and may allow the garriſon to march out with ammunition and baggage, with all the honours of war, to be eſcorted and conducted to a place of ſafety. The governor of a place, if reduced to it by the ſtate of affairs, may deliver it up at diſcretion, may ſurrender himſelf and his garriſon priſoners of war, or engage that, for a ſtipulated time, or even to the end of the war, they ſhall not carry arms againſt the enemy or his allies: and he validly promiſes for all under his command, who are obliged to obey him while he keeps within the limits of his function (Sect. 23.).

But ſhould the beſieging general take on him to promiſe that his maſter ſhall never appropriate to himſelf the place when ſurrendered, or at a certain term ſhall be obliged to reſtore it, he would exceed the limits of his commiſſion, contracting for things quite out of his power. And the like may be ſaid of a governor who in the capitulation ſhould go ſo far as to alienate his town for ever, and to deprive his ſovereign of the right of retaking it; or who promiſes that his garriſon ſhould never carry arms, not even in another war. It is manifeſt that his functions give him no ſuch power. Therefore, in conferences for a capitulation, ſhould one of the commanders inſiſt on conditions which the other does not think himſelf impowered to grant, one expedient is

left them, which is to ſettle a ſuſpenſion of arms; whereby all things remain as they were till farther orders be received.

§ 263. Obſervation on capitulations, and the uſefulneſs of it.

At the beginning of this chapter we have ſhewn our reaſons for not entering into explicit proofs here, that all theſe conventions made during the courſe of the war, are to be inviolably adhered to; we ſhall therefore only obſerve with regard to capitulations in particular, that as to violate them is unjuſt and ſcandalous, ſo this perfidiouſneſs often proves detrimental to the party who has been guilty of it. Who will henceforth place any confidence in him? The towns which he ſhall attack will hold out to the moſt terrible extremities, rather than rely on his word. He as it were ſtrengthens his enemies by inciting them to a deſperate defence, and every ſiege which he undertakes will be terrible. On the contrary, fidelity attracts confidence and affection, it facilitates enterpriſes, removes obſtacles, and paves the way to glorious ſucceſſes. Of this hiſtory furniſhes us a fine example in the conduct of George Baſte, general of the imperialiſts in 1602, againſt Battori and the Turks. The inſurgents of Battori's party having ſurpriſed Biſtrith, otherwiſe called Miſſa, Baſte recovered the town by a capitulation, which in his abſence was violated by ſome German ſoldiers: but being informed of it, he immediately hung up all the ſoldiers to a man, and out of his own purſe paid the inhabitants all the damages they had ſuſtained. This action wrought ſo on the rebels, that they all ſubmitted to the emperor without demanding any other ſurety than the word of general Baſte[a].

§ 264. Of promiſes made to the enemy by individuals.

Individuals, military or others, who happen to be alone with the enemy, are through this neceſſity left to their own conduct; they may, as to their own perſons, do what an officer might do for himſelf, and his corps:

[a] Memoires de SULLY, redigés par M. de L'Ecluſe, Tom. IV. page 179 and 180.

ſo

ſo that if by reaſon of their ſituation they make any promiſe, provided it does not turn on things which can never be in the diſpoſal of private perſons, this promiſe is valid, the power with which it is made being ſufficient. For when a ſubject can neither receive his ſovereign's orders nor enjoy his protection, he returns to his natural rights, and is by all juſt and fair means to conſult his ſafety: ſo that if this individual has promiſed a ſum for his ranſom, the ſovereign ſo far from having a right to diſcharge him from his promiſe, ſhould oblige him to fulfil it: the good of the ſtate requires the obſervance of faith, and that ſubjects ſhould have this way of ſaving their lives or recovering their liberty. Thus a priſoner releaſed on his word, is to obſerve it religiouſly, and his ſovereign has no right to oppoſe the diſcharge of ſo eſſential a duty; for it was only on giving his word that the priſoner was releaſed.

Country people alſo, the inhabitants of villages or defenceleſs towns, are bound to pay the contributions which they have promiſed, to ſave themſelves from pillage.

What is much more, a ſubject would even be allowed to renounce his country, if the enemy, being maſter of his perſon, refuſed to grant him life on any other condition. For as the ſociety cannot protect and defend him in this exigency, he enters on his natural rights. And beſides, ſhould he obſtinately refuſe compliance, what will the ſtate get by his death? Undoubtedly while any hope remains, while there is any way of ſerving our country, we are to expoſe ourſelves for it; nor ſhould any danger deter us. I here ſuppoſe that we are either to renounce our country or to die miſerably, without being any advantage to it. If we by our death can ſerve it, then let us imitate the heroic generoſity of the *Decii*. Indeed an engagement to ſerve againſt our country, were it even for ſaving our life, is diſhonourable; rather

rather than acquieſce to ſuch a ſcandalous promiſe, a man of ſpirit would die a thouſand deaths. If a ſoldier meeting an enemy in a bye-place, ſeizes him, but promiſes him his life or liberty on condition of a ranſom, this agreement is to be regarded by the ſuperiors, for the ſoldier being then left to himſelf, and his own maſter, did nothing beyond his right. He might have thought that it was not proper for him to attack that enemy, and let him go. Under his officer he is to obey, when alone he is left to his own prudence. *Procopius* relates, that two ſoldiers, the one a Goth and the other a Roman, who being fallen together into a pit, reciprocally promiſed each other their life; and this agreement was approved by the Goths.

CHAP. XVII.

Of Safe Conducts and Paſſports, with Queſtions on the Ranſom of Priſoners of War.

§ 265. Of ſafe-guard and paſſport.

A SAFE-GUARD and paſſport are a kind of privilege, which gives perſons a right to go and come ſafely, or the right of removing certain things in ſafety. The word paſſport is uſed in ſome occurrences, for perſons in whom there is no particular exception againſt their coming or going in ſafety, and whom it the better ſecures for avoiding all debate, or diſpenſing them from ſome general prohibition. A ſafe-conduct is given to thoſe who otherwiſe could not ſafely go to the places where he who grants it is maſter: for inſtance, to a perſon charged with ſome miſdemeanor, or to an enemy. We are here to treat of the latter.

§ 266. From what authority it emanes

All ſafe-conducts, like every other act of ſupreme cognizance, flow from the ſovereign authority; but the prince

prince may delegate to his officers the power of furniſhing ſafe-conducts, and with this they are inveſted either by an expreſs commiſſion, or in conſequence of the nature of their functions. A general of an army from the very nature of his poſt, can grant ſafe-conducts; and as they are derived, though mediately from the ſovereign authority, the other generals or officers of the ſame prince are to reſpect them.

§ 267. Is not transferable from one to another.

The perſon nominated in the ſafe-conduct cannot transfer his privilege to another; not knowing whether it be indifferent to him who gave it, that any other ſhould uſe it in his ſtead, and he is not to preſume ſuch a thing; nay ſo far from preſuming it, he is rather to ſuppoſe the contrary, by reaſon of the abuſes which may ariſe from it; and he cannot aſſume to himſelf any farther privilege than was intended him. If the ſafe conduct be granted, not for perſons, but for effects, thoſe effects may be removed by others beſide the owner. The choice of thoſe who remove them is indifferent, provided there be no perſonal exception, which renders them juſtly ſuſpected by him who gives the conduct, or interdicts them from entering his territories.

§ 268. Extent of the ſecurity.

He who promiſes ſecurity by a ſafe-conduct, promiſes it where he is maſter, not only in his territories but likewiſe where any of his troops may be, and he not only is to forbear violating this ſecurity, either by himſelf or his people, but he is to protect and defend him to whom he has promiſed it, to puniſh any of his ſubjects who have offered any violence to him, and oblige them to make good the damage.

§ 269. How the right given to a ſafe conduct is to be judged.

The right ariſing from a ſafe-conduct proceeding entirely from the will of him who grants it, this will is the ſtandard by which the extent of it is to be meaſured: and this will ſhews itſelf in the end for which the ſafe-conduct was granted: conſequently he who has been per-

permitted to go away, has no right to return, and a ſafe-conduct granted purely for going, cannot ſerve for repaſſing. If granted for certain affairs, it is to be of force till thoſe are concluded, and the perſon has time to depart; if it is ſpecified to be granted for a journey, it will alſo ſerve for the repaſſing, the journey including both the paſſage and return. As this privilege conſiſts in the liberty of going and coming in ſafety, it differs from the permiſſion in ſettling in any part, and conſequently cannot give a right to ſtop any where, for a long time, unleſs on buſineſs, with a view to which the ſafe-conduct was aſked and granted.

§ 270. Whether it includes the baggage and domeſtics.

A ſafe-conduct given to a traveller, naturally includes his baggage or his clothes, and every thing neceſſary for his journey, with even a domeſtic or two, according to the rank of the perſon; but with regard to theſe particulars, as others which we have touched on, the ſafeſt way, eſpecially among enemies and other ſuſpected perſons, is to enumerate and categorically expreſs every thing, which is now the preſent practice: the baggage and domeſtics, where requiſite, are particularized.

§ 271. Safe conduct granted to the father, does not contain his family.

Though a permiſſion to ſettle any where, granted to the father of a family, naturally includes his wife and children, it is otherwiſe with a ſafe-guard; for if a man ſettles any where, his family is generally with him, but in journies it is uſually left at home.

§ 272. Of a ſafe conduct given in general to any one and his retinue.

The ſafe-conduct granted to a perſon for *himſelf and his retinue*, cannot give him a right of bringing with him perſons juſtly ſuſpected to the ſtate, or who had been baniſhed, proſcribed, or were fugitives for ſome time; nor give ſecurity to ſuch: for the ſovereign granting ſafe-conduct in thoſe general terms, does not ſuppoſe any ſuch inſolence as to abuſe it, for bringing into his country delinquents, or perſons who have particularly offended him.

§ 273. Of the time of the ſafe conduct.

A ſafe-conduct given for a ſtated term, expires at the end of the term ſpecified therein. And the bearer, if he does

does not retire before that time, may be ſeized, and even puniſhed according to circumſtances; eſpecially if he has given room for ſuſpicion by a delay of his own framing.

274. Of a perſon detained forcibly beyond the term.

But if detained by force, as by ſickneſs, ſo as to be unable to depart in time, a proper reſpite ſhould be allowed him; for ſafety has been promiſed to him, and though aſſured him only for a limited time, it is not his fault that he has not departed within the term. The caſe is different from that of an enemy coming into our country during a truce; he has no ſpecial promiſe from us; he at his own peril makes uſe of a general liberty allowed by the ſuſpenſion of hoſtilities: all we have promiſed to the enemy is, to forbear hoſtilities for a certain time, and at the expiration of it we are concerned to ſee that their courſe be freely renewed, without the diſturbance of endleſs excuſes and pretences.

275. The ſafe conduct does not expire at the death of him who gave it.

The ſafe-conduct does not expire at the deceaſe or depoſition of him who granted it; for it was given in virtue of the ſovereign authority which never dies, nor is the efficacy thereof annexed to the perſon exerciſing it. It is of this act as of other ordinances of the public power; their validity, their duration does not depend on the life or removal of him who enacted them, unleſs in their very nature, or by expreſs declaration, they are perſonal to him.

§ 276. How it may be revoked.

This does not hinder but that the ſucceſſor may, on good reaſons, revoke a ſafe-conduct; even he from whoſe hands it came may in like caſe revoke it, and is not always obliged to make known his reaſons. Every privilege, when it becomes detrimental to the ſtate, may be revoked; ſuch as a gratuitous privilege, purely and ſimply, a purchaſed privilege, by indemnifying the parties concerned. Suppoſe a prince or his general are preparing a ſecret expedition, is he to ſuffer, that by means of a ſafe conduct before obtained, his preparatives ſhall be inſpected, by which the enemy may gain intelligence of

of them? But a ſafe-conduct is not to be uſed as a ſnare; if it be revoked, the bearer muſt be allowed time and liberty to depart in ſafety. If he, like any other traveller, be detained ſome time, to prevent his carrying intelligence to the enemy, no ill treatment is to be offered him; nor is he to be kept longer than while the reaſons of his detainder ſubſiſt.

§ 277. Of a ſafe-conduct with the clauſe *for ſuch time as we ſhall think fit.*

If the ſafe-conduct has this clauſe, *For ſuch time as we ſhall think fit*, it gives only a precarious right, and is revocable every moment; but while it is not *expreſs*, it remains valid; it expires on the death of him who gave it, who from that time ceaſes to will the continuation of the privilege; yet it muſt always be underſtood that from the moment of the expiration of ſuch conduct, the bearer is to be allowed a proper time for his ſafe departure.

§ 278. Of conventions relating to the ranſom of priſoners.

After diſcuſſing the right of making priſoners of war, the obligation of releaſing them at the peace by exchange or ranſom, and of that incumbent on the ſovereign to deliver them, it remains to conſider the nature of conventions relating to ſuch unfortunate perſons. If ſovereigns at war have agreed on a cartel for the exchange or ranſom of priſoners, they are faithfully to obſerve it no leſs than every other convention; but if, as was formerly the frequent practice, the ſtate leaves to every priſoner, at leaſt during the war, the care of redeeming himſelf; ſuch particular conventions offer many queſtions, of which we ſhall only touch on the principal.

§ 279. The right of requiring a ranſom may be transferred.

He who has acquired a lawful right of demanding a ranſom from his priſoner may transfer his right to a third perſon. This was practiſed in the laſt ages: It was frequent for military perſons to reſign their priſoners to others, and conſequently all the rights they held over them. But as the perſon taking a priſoner is obliged, for the ſake of his reputation, to treat him with juſtice and humanity (Sect. 150.) he is not to transfer his right in an unlimited manner, to one who might probably abuſe

abuſe it; when he has agreed with his priſoner concerning the price of the ranſom, he may transfer the right to whom he pleaſes.

§ 280. What may annul the convention made for the rate of the ranſom.

On the concluſion of an agreement made with a priſoner for the price of his ranſom, it becomes a perfect contract, and cannot be receded from under pretence that the priſoner is diſcovered to be richer than was imagined: for there is no manner of neceſſity he ſhould be rated according to the wealth of a priſoner; that is not the ſcale for meaſuring the right of detaining a priſoner of war (Sect. 148. 153.). But it is natural to proportion the price of the ranſom to the priſoner's rank and character, the liberty of an officer of diſtinction being of greater conſequence than that of a private man, or inferior officer. If the priſoner has not only concealed but diſguiſed his rank, it is a ſordid fraud, and gives a right for annulling the agreement.

§ 281. Of a priſoner dying before payment of ranſom.

If a priſoner, having agreed on the price of his ranſom, dies before payment, it is aſked whether this price be due, and whether the heirs are obliged to diſcharge it? Unqueſtionably they are obliged to it, if the priſoner died in the poſſeſſion of his liberty: for from the moment of his releaſe; in conſideration of which he had promiſed a ſum, this ſum becomes due, and does not at all belong to his heirs. But if he had not obtained his liberty at the time of his death, it can be no debt to him or his heirs, unleſs the agreement was otherwiſe; and he is not reputed to have received his liberty till he is abſolutely permitted to depart free; when neither he whoſe priſoner he was, nor the ſovereign oppoſed his releaſe and departure.

If he has only been permitted to take a journey for applying to his friends, or his ſovereign, to furniſh him with the means of ranſoming himſelf, and he dies before he is poſſeſſed of his full liberty, before his final diſcharge from his parole, nothing is due for his ranſom.

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If after agreeing on the price, he is detained in prison till the time of payment and he dies before, the debt is paid by his death, and does not affect his heirs; such an agreement on the side of him who detains his prisoner, being no more than a promise of giving him his liberty for a certain sum paid down. A promise of buying and selling does not suppose the purchaser to pay the price of a thing, if it happens to perish before the bargain is concluded. But if the contract of sale be perfect, the purchaser shall pay the price of the things sold, though it should happen to perish before the deliverance of it, provided there was no fault or delay in the seller. For this reason, if the seller has absolutely concluded the agreement of the ransom, and from that time owns himself a debtor for the stipulated sum, remaining no longer as a prisoner, but for the security of the payment; his intervening death does not extinguish the debt, the ransom agreed on remains still due.

If the agreement says, that the ransom shall be paid on a certain day, and the prisoner happens to die before that day, then the heirs are bound to discharge it, for the ransom was due, and the day was assigned, only, as the term for payment.

§ 282. Of a prisoner released on condition of procuring the release of another.

From the same principles, strictly speaking, it follows, that a prisoner, released on condition of procuring the release or discharge of another, should return to prison, in case the latter happened to die before he could procure him his liberty. But certainly such an unfortunate case is entitled to regard, and equity seems to require that this prisoner should continue in the enjoyment of a liberty provided he pays a just equivalent, it being now out of his power to purchase it precisely at the price agreed on.

§ 283. Of him who is taken a second time before he has paid his first ransom.

If a prisoner fully set at liberty after having promised, but not paid, his ransom, happens to be taken a second time; it is evident that, without being exempted from paying

paying his firſt ranſom; if he is willing to be ſet at liberty, he muſt pay a ſecond ranſom.

§ 284. Of him who is delivered before he has received his liberty.

On the contrary, though the priſoner has agreed for the rate of his ranſom if before the execution of the compact, before he is ſet at liberty in virtue of it, he be retaken by his party, he owes nothing. I here evidently ſuppoſe, that the finiſhing hand was not put to the compact, that the priſoner had not acknowledged himſelf debtor for the rate of his ranſom. He whoſe priſoner he was, had as it were only made him a promiſe of ſelling, and he had promiſed to purchaſe; but the purchaſe and ſale had not actually paſſed into effect; the property was not actually transferred.

§ 285. Whether the things which a priſoner has found means to conceal, belongs to him?

The property belonging, or of what belongs to a perſon does not paſs to him who takes him priſoner, unleſs at the ſame time he ſeizes on ſuch things. Of this there is no doubt, eſpecially in our moderate times, when priſoners of war do not fall into ſlavery. And even by the law of nature, the property of a ſlave's goods does not, without ſome other reaſon, paſs to the maſter of the ſlave. There is nothing in ſlavery of which this can in itſelf be the natural effect. If a man obtains a power over the liberty of another, does it follow that he has likewiſe a right over his property? Therefore if an enemy has not ſtript his priſoner, or the latter has found means to conceal ſomething from his ſearch, what he has preſerved ſhould belong to him, or he may employ it towards the payment of his ranſom. At preſent even priſoners are not always ſtripped. If the ravenous ſoldier runs ſuch lengths, an officer ſhould be above taking the minuteſt article from them. An Engliſh general was taken priſoner at the battle of Rocoux, and though the perſons into whoſe hands he fell were only troopers, they claimed no right to any thing but his arms.

§ 286. Of the hoſtage given for the releaſe of a priſoner.

The death of a priſoner puts a period to the right of him who had taken him, therefore an hoſtage given for the

the procuring a priſoner's liberty is to be releaſed, the moment the priſoner expires; and if the hoſtage dies, the priſoner is not releaſed by ſuch death. The reverſe of this is true, if one, inſtead of being an hoſtage for the other, had been ſubſtituted in his ſtead.

CHAP. XVIII.

Of a Civil War.

§ 287. Foundation of the Sovereign's right againſt the rebels.

IT is a queſtion very much debated, whether a ſovereign is to obſerve the common laws of war towards rebellious ſubjects, who have openly taken up arms againſt him? A flatterer or a cruel ruler immediately ſays, that the laws are not made for rebels, for whom no puniſhment can be too ſevere. Let us proceed more mildly, and reaſon from the inconteſtible principles above laid down. That we may clearly ſee how the ſovereign is to behave towards revolted ſubjects, we ſhould firſt remember, that all the ſovereign's rights are derived from thoſe of civil ſociety, from the truſt repoſed in him, from the obligation he lies under of watching over the welfare of the nation, of procuring its greateſt happineſs, of maintaining order, juſtice, and peace therein (Book I. Chap. IV.) Secondly, we muſt diſtinguiſh the nature and degree of the different diſorders which may diſturb the ſtate, oblige the ſovereign to take arms, or ſubſtitute the means of force inſtead of thoſe of authority.

§ 288. Who are rebels?

All ſubjects unjuſtly taking arms againſt the head of a ſociety are termed *rebels*, whether their view be to deprive him of the ſupreme authority, or whether they intend to reſiſt his commands, in ſome particular affair, in order to impoſe conditions on him.

§ 289. Popular commotion, inſurrection, ſedition.

Popular commotion is a concourſe of people tumultuouſly aſſembled, and reſiſt the voice of their ſuperiors, whether

whether their deſign be againſt thoſe ſuperiors themſelves, or only ſome private perſons. Such violent commotions are common when the people think themſelves aggrieved, and are occaſioned by no order of men ſo frequently as the tax-gatherers. If the rage of the malecontents be particularly levelled at the magiſtrates, or others veſted with the public authority, and they proceed to a formal diſobedience or violent proceedings, it is called a *ſedition*. When the evil ſpreads, infecting great numbers in the city or provinces, and ſubſiſts in ſuch a manner that the ſovereign is no longer obeyed, ſuch a diſorder cuſtom has more particularly diſtinguiſhed by the name of *inſurrection*.

§ 290. How the ſovereign is to ſuppreſs them.

All theſe violences diſturb the public order, and are crimes of ſtate, even when ariſing from juſt cauſes of complaint. For violent meaſures are interdicted in civil ſociety; the injured party ſhould have recourſe to the magiſtrates, to whom they may apply for redreſs; and if juſtice be not obtained from them, their complaints may then be laid at the foot of the throne. Every citizen ſhould even patiently ſuffer ſupportable evils, rather than diſturb the public peace. Nothing leſs than a denial of juſtice from the ſovereign, or affected delays, can excuſe the furious commotions of a provoked people; they in ſome meaſure juſtify themſelves if the evils be intolerable, and the oppreſſions great and manifeſt. But what conduct ſhall the ſovereign obſerve towards the inſurgents? I anſwer in general, that which ſhall at the ſame time be moſt conſentaneous to juſtice, and moſt ſalutary to the ſtate. If he is to repreſs thoſe who unneceſſarily diſturb the public peace, he is by the ſame reaſoning to ſhew clemency towards unfortunate perſons, to whom juſt cauſes of complaint have been given, and who are guilty only in having undertaken to do themſelves juſtice: they have been wanting in patience rather than fidelity. Subjects riſing againſt their prince without cauſe, deſerve

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ſevere puniſhments, yet here the number of delinquents calls for the ſovereign's clemency. Shall he depopulate a city, or deſolate a province, in puniſhing their rebellion? Such a chaſtiſement, however juſt in itſelf, becomes a cruelty when extended to ſo great a number of perſons. Had the inſurrection of the Netherlands againſt Spain been totally unwarrantable, every man of virtue would ſtill execrate the memory of the Duke of Alva, who made it his boaſt that he had cauſed above twenty thouſand heads to be ſtruck off by the hands of the common executioner. Let not his ſanguinary imitators expect to juſtify their enormities by neceſſity. Who was ever more undeſervedly inſulted by his ſubjects than Henry the Great of France? His conqueſts were ever accompanied by an uniform clemency; and at length that excellent prince obtained the ſucceſs he deſerved; he thereby gained over faithful ſubjects; whereas the Duke of Alva loſt his maſter the United Provinces. Crimes common to many are puniſhed by penalties common to the guilty; the ſovereign may deprive a town of its privileges, at leaſt till it has fully acknowledged its fault: as for penalties, let them be reſerved for the authors of the troubles, for thoſe incendiaries which incite the people to revolt. But tyrants alone will treat, as ſeditious, thoſe brave and reſolute citizens who exhort the people to preſerve themſelves from oppreſſion in the vindication of their rights and privileges: a good prince will commend ſuch virtuous patriots, provided their zeal be tempered with moderation and prudence. If he has juſtice and his duty at heart, if he aſpires to that immortal and unſullied glory of being the father of his people; let him miſtruſt the ſelfiſh ſuggeſtions of a miniſter, who repreſents to him as rebels all thoſe citizens who do not hold out their hands to chains, who refuſe tamely to ſuffer the ſtrokes of arbitrary power.

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§ 291. Is to obſerve what he has promiſed to rebels.

The ſafeſt, and at the ſame time the moſt juſt way thoroughly to appeaſe ſeditions, is to give the people ſatisfaction; and if the inſurrection has been without cauſe, which perhaps has been never the caſe, ſtill as we have ſaid, an amneſty is to be granted where the offenders are numerous. When the amneſty is once publiſhed and accepted, whatever has paſt muſt be buried in oblivion. No one is to be called to an account for what has been done relative to the diſturbances; and in general a prince who makes any conſcience of his word, is faithfully to keep what he has promiſed to rebels themſelves, I mean to thoſe of his ſubjects who have revolted without reaſon or neceſſity. If his promiſes are not inviolable, what ſecurity have the rebels in treating with him? When they have once drawn the ſword, they have nothing to do but, as one of the ancients expreſſes it, to throw away the ſcabbard. The prince will then want the mild and ſalutary means of appeaſing a revolt; to exterminate the rebels will be the only expedient remaining. Theſe will become formidable through deſpair; compaſſion will beſtow ſuccours on them; their party will increaſe, and the ſtate will be in danger. What would have become of France, if the leaguers had not truſted Henry the Great's promiſes? The ſame reaſons which ſhould render the faith of promiſes inviolable and ſacred (Book II. Sect. 163. 218. &c. and Book III. Sect. 174.) between individual and individual, between ſovereign and ſovereign, between enemy and enemy, ſubſiſt in the ſame force between the ſovereign and his ſubjects, whether inſurgents or rebels. However, if they have extorted from him odious conditions, contrary to the happineſs of the nation, the welfare of the ſtate, having no right of doing or granting any thing oppoſite to that grand rule of his conduct and power, he may juſtly revoke pernicious conceſſions, availing himſelf in this proceeding, by the conſent of the nation, whom he is to conſult, and by the manner and forms pointed out

to him by the conſtitution of the ſtate: but this remedy is to be uſed with reſerve, and only in things of the laſt moment, that the faith of promiſes may ſuffer no violation.

§ 292. Of a civil war.

When a party is formed in a ſtate, which no longer obeys the ſovereign, and is of ſtrength ſufficient to make head againſt him; or when in a republic the nation is divided into two oppoſite factions, and both ſides take arms; this is called a *civil war*. Some confine this term only to a juſt inſurrection of ſubjects againſt an unjuſt ſovereign, to diſtinguiſh this lawful reſiſtance from *rebellion*, which is an open and unjuſt reſiſtance: but what appellation will they give to a war in a republic torn by two factions, or in a monarchy between two competitors for the crown? Uſe appropriates the term of civil war to every war between the members of one and the ſame political ſociety. If it be between part of the citizens on one ſide, and the ſovereign with thoſe who continue in obedience to him on the other; it is ſufficient that the male-contents have ſome reaſon for taking arms, to give this diſturbance the name of *civil war*, and not that of *rebellion*. This laſt term is applied only to ſuch an inſurrection againſt lawful authority, as is void of all appearance of juſtice. The ſovereign indeed never fails to term rebels all ſubjects openly reſiſting him; but when theſe become of ſtrength ſufficient to oppoſe him, ſo that he finds himſelf compelled to make war regularly on them, he muſt be contented with the term of civil war.

§ 293. A civil war produces two independent parties.

It is foreign from our purpoſe here to weigh the reaſons whereby a civil war is warranted and juſtified; we have elſewhere treated of the caſes wherein ſubjects may reſiſt the ſovereign (Book I. Chap. IV.). Omitting therefore the juſtice of the cauſe, we will conſider the maxims to be obſerved in a civil war, and examine whether it be incumbent on the ſovereign to keep within the common laws of war. A civil war breaks the bands of ſociety and government, or at leaſt it ſuſpends their

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force and effects; it produces in the nation two independent parties, conſidering each other as enemies, and acknowledging no common judge: therefore of neceſſity theſe two parties muſt, at leaſt for a time, be conſidered as forming two ſeparate bodies, two diſtinct people, though one of them may be in the wrong in breaking the continuity of the ſtate, to riſe up againſt lawful authority, they are not the leſs divided in fact; beſides, who ſhall judge them? who ſhall pronounce on which ſide the right or the wrong lies? On earth they have no common ſuperior. Thus they are in the caſe of two nations, who having a diſpute which they cannot adjuſt, are compelled to decide it by force of arms.

§ 294. They are to obſerve the common laws of war.

Things being thus ſituated, it is very evident that the common laws of war, thoſe maxims of humanity, moderation, and probity which we have before enumerated and recommended, are in civil wars to be obſerved on both ſides. The ſame reaſons on which the obligation between ſtate and ſtate is founded, render them even more neceſſary in the unhappy circumſtance when two incenſed parties are deſtroying their common country. Should the ſovereign conceive he has a right to hang up his priſoners as rebels, the oppoſite party will make repriſals: if he does not religiouſly obſerve the capitulations, and all the conventions made with his enemies, they will no longer rely on his word: ſhould he burn and deſtroy, they will follow his example: the war will become cruel and horrid: its calamities will increaſe on the nation. The Duke de Montpenſier's infamous and barbarous exceſſes againſt the reformed in France are too well known: the men were delivered up to the executioner, and the women to the brutality of the ſoldiers. What was the conſequence? the reformed became exaſperated, they took vengeance of ſuch inhuman practices; and the war, before ſufficiently cruel, as a civil and religious war, became more bloody and deſtructive. Who

could without horror read of the ſavage cruelties committed by the Baron des Adrets? By turns a catholic, and a proteſtant, he diſtinguiſhed himſelf by his barbarity to both ſides. At length there was a neceſſity of departing from ſuch affectations of juridical ſuperiority againſt perſons who could ſupport their cauſe ſword in hand, and of treating them not as criminals but as enemies. Even troops have often refuſed to ſerve in a war wherein the prince expoſed them to cruel repriſals. Officers who had the higheſt ſenſe of honour, though ready to ſhed their blood in the field of battle for his ſervice, have not thought it any part of their duty to run the hazard of an ignominious death. Therefore whenever a numerous party thinks it has a right to reſiſt the ſovereign, and finds itſelf able to declare that opinion ſword in hand, the war is to be carried on between them in the ſame manner as between two different nations; and they are to leave open the ſame means for preventing enormous violences, and reſtoring peace.

A ſovereign having conquered the oppoſite party, and reduced it to ſubmit and ſue for peace, he may except from the amneſty the authors of the troubles, and the heads of the party; may bring them to a legal trial, and on conviction puniſh them. He may eſpecially act thus with regard to diſturbances raiſed not ſo much on account of the people's intereſts as the private views of ſome great men, and which rather deſerve the appellation of *rebellion* than of *civil war*. This was the caſe of the unfortunate Duke of Montmorency: he had taken up arms againſt the King, in vindication of the Duke of Orleans, and being defeated and taken priſoner at the battle of *Caſtelnaudarri*, he loſt his life on a ſcaffold, by the ſentence of the parliament of Toulouſe. If he was generally pitied by men of virtue, it is becauſe they conſidered him not ſo much a rebel againſt the King, as oppoſing the exorbitant power of an imperious miniſter;

and

and his heroic virtue ſeemed to warrant the purity of his intentions [a].

§ 295. The effects of civil war diſtinguiſhed according to the caſes.

When ſubjects take up arms without ceaſing to acknowledge the ſovereign, and only to procure a redreſs of grievances, there are two reaſons for obſerving the common laws of war towards them. Firſt, leaſt a civil war becoming more cruel and deſtructive by the repriſals, which, as we have obſerved, the inſurgents will oppoſe to the prince's ſeverities. 2. The danger of committing great injuſtice by the haſtily puniſhing thoſe who are accounted rebels, the tumult of diſcord, and the flame of a civil war, little agree with the proceedings of pure and ſacred juſtice: more quiet times are to be waited for. It will be wiſe in the prince to ſecure his priſoners till, having reſtored tranquillity, he is in a condition of having them tried according to the Laws.

As to the other effects which the law of nations attributes to public war (See Chap. XII. of this Book) and particularly the acquiſition of things taken in war; ſubjects who take arms againſt their ſovereign, without ceaſing to acknowledge him, cannot pretend to theſe effects. The booty alone, the moveable goods carried off by the enemy, are accounted loſt to the owners; but this is only on account of the difficulty of knowing them again, and the numberleſs inconveniences which would ariſe from the recovery of them. All this is uſually ſettled in the edict of pacification or the act of amneſty.

But when a nation becomes divided into two parties abſolutely independent, and no longer acknowledging a common ſuperior; the ſtate is diſſolved, and the war betwixt the two parties in every reſpect is the ſame with that of a public war, between two different nations. Whether a republic be torn into two factious parties, each pretending to form the body of the ſtate, or a kingdom be divided betwixt two competitors to the

[a] See the hiſtorians of the reign of Lewis XIII.

crown;

crown; the nations is thus ſevered into two parties who will mutually term each other rebels. Thus there are two bodies pretending to be abſolutely independent, and who have no judge (Sect. 293.) they decide the quarrel by arms, like two different nations. The obligation of obſerving the common laws of war is therefore abſolute, indiſpenſable to both parties, and the ſame which the law of nature obliges all nations to obſerve between ſtate and ſtate.

§ 296. Conduct to be obſerved by foreign nations.

Foreign nations are not to interfere in the conſtitutional government of an independent ſtate (Book II. Sect. 54.). It is not for them to judge between contending citizens, nor between the prince and his ſubjects: to them the two parties are equally foreigners, equally independent of their authority. They may however interpoſe their good offices for the reſtoration of peace, and this the law of nature preſcribes to them (Book II. Chap. I.). But if their mediation proves faithleſs, they who are not tied by any treaty may, for their own conduct, take the merit of the cauſe into conſideration, and aſſiſt the party which they ſhall judge to have right on its ſide, in caſe this party ſhall requeſt their aſſiſtance or accept the offer of it: I ſay they may, from the very ſame reaſon that they are at liberty to eſpouſe the juſt quarrel of a nation entering into a war with another. As to the allies of a ſtate diſtracted by a civil war, they will find a rule for their conduct in the nature of their engagements, combined with the circumſtances of the war. Of this we have treated elſewhere (See Book II. Chap. XII.) and particularly Sect. 196, 197.

THE

THE LAW OF NATIONS.

BOOK IV.

Of the Reſtoration of Peace; and of Embaſſies.

CHAP. I.

Of Peace, and the Obligation of Cultivating it.

§ 1. What peace is.

PEACE is oppoſed to war, it is that deſirable ſtate in which every one quietly enjoys his rights, or, if controverted, they are diſcuſſed with mildneſs and argument. Hobbes has dared to ſay, that war is the natural ſtate of man. But if, agreeable to reaſon, by the natural ſtate of man is underſtood that to which he is deſtined and called by his nature, peace ſhould much rather be termed his natural ſtate. For a rational being is to terminate

terminate his differences by rational methods; whereas to decide them by force is proper to beaſts [a]. Man, as we have already obſerved (Prelim. Sect. 10.) alone and deſtitute of ſuccours, would neceſſarily be very miſerable; without commerce and the aſſiſtance of his ſpecies he could have no enjoyment of his life; could not unfold his faculties, nor live in a manner ſuitable to his nature; all this is to be found only in *peace*. Thus it is in peace that men regard, ſuccour, and love each other: this is ſo happy a ſtate that they would never quit it, were it not blended by the impetuoſity of paſſion, and the groſs deceptions of ſelf-love. What little we have ſaid of the effects of war will be ſufficient to give ſome idea of its various calamities; and it is a melancholy conſideration that the injuſtice of the wicked ſhould ſo often render it inevitable.

§ 2. Obligation of cultivating it.

Nations, really humane, which have a ſerious ſenſe of their duty, and underſtand their true and ſubſtantial intereſts, will never ſeek their advantage to the detriment of another; however intent they may be on their own happineſs, they will always take care to unite it with that of others, and with juſtice and equity. Thus diſpoſed they will neceſſarily cultivate peace; if they do not live together in peace, how can they perform thoſe mutual and ſacred duties which nature enjoins them? And this ſtate is found to be no leſs neceſſary to their happineſs than to the diſcharge of their duties. So that the law of nature every way obliges them to ſeek and cultivate peace. This divine law has no other end than the welfare of mankind. To this all its rules, all its precepts tend: they are all deducible from this principle, that men ſhould ſeek their own felicity: mo-

[a] Nam cum ſint duo genera decertandi; unum per deceptationem, alterum per vim: cumque illud proprium ſit hominis, hoc belluarum: confugiendum eſt ad poſterius, ſi uti non licet ſuperiore. Cicero de offic. Lib. I. Cap. II.

rality

rality being no more than the ſcience of acquiring happineſs. As this is true of individuals, it is equally ſo of nations, as any one reflecting on what we have ſaid (Book II. Chap. I.) of their common and reciprocal duties, will be eaſily convinced.

§ 3. The ſovereign's obligation to it.

This obligation of cultivating peace binds the ſovereign by a double tie. He owes his care to his people on whom war draws a multitude of evils: and this care is due to them in the moſt ſtrict and indiſpenſable manner; government being committed to him only for the advantage of the nation (Book I. Sect. 39.). The ſame care he owes to foreign nations, whoſe happineſs likewiſe is diſturbed by war. The nations duty in this reſpect has been ſhewn in the preceding chapter; and the ſovereign being inveſted with the public authority, is charged with all the duties of the ſociety and body of the nation (Book I. Sect. 41.).

§ 4. Extent of this duty.

Of this peace, ſo propitious to mankind, a nation or ſovereign ſhould not only avoid diſturbing; they are further obliged to promote it as much as lies within their power, to diſſuade others from breaking it without neceſſity, to exhort them to a love of juſtice, equity, and the public tranquillity, to a love of peace. It is one of the beſt offices he can perform to nations, and to the whole univerſe. What a glorious and amiable appellation is that of peace-maker! Were a powerful prince rightly acquainted with the advantages of it; did he repreſent to himſelf that pure and effulgent glory which this endearing character offers him, with the gratitude, the love, the veneration and the confidence of nations enjoying happineſs under his auſpices; did he know what it is to reign over hearts, he would become the benefactor, the friend, the father of mankind: and in being ſo, he would infinitely more delight than in the moſt ſignal conqueſts. The moſt glorious period of Auguſtus's life was,

was, when he ſhut the temple of *Janus*, adjuſted the diſputes of kings and nations, and gave peace to the univerſe. Here he appears the greateſt of mortals, almoſt divine.

§ 5. Of the diſturbers of public peace.

But thoſe diſturbers of public peace, thoſe ſcourges of the earth, who, ſwayed by a lawleſs thirſt of power, or a haughty and ſavage diſpoſition, take arms without juſtice or reaſon, who ſport with the quiet of mankind, and the blood of their ſubjects; thoſe falſe heroes, however deified by the injudicious admiration of the vulgar, are in effect the worſt of enemies to their ſpecies, and deſerve to be treated as ſuch. Experience ſhews how very calamitous war is, even among nations not immediately engaged in it. War diſturbs commerce, deſtroys the properties of men, raiſes the price of neceſſaries, ſpreads too juſt alarms, obliges all nations to be upon their guard, and keep up, at a great expence, an armed force. Therefore he who breaks peace without cauſe, neceſſarily injures nations, who are the object of his arms; and by this pernicious example eſſentially attacks the happineſs and ſafety of every nation on earth. He gives them a right to join in repreſſing, chaſtiſing, and depriving him of a power which he has ſo enormouſly abuſed. What evils does he not bring on his own nation, laviſhing its blood to gratify his exorbitant paſſions, and expoſing it to the reſentment of confederating enemies! A famous miniſter of the laſt century has rendered his memory juſtly odious to his nation, by involving it in continual wars without either juſtice or neceſſity: if by his abilities and indefatigable application he procured diſtinguiſhed ſucceſſes in the field of battle, he drew on it at leaſt for a time, the execration of all Europe.

§ 6. How far war may be continued.

The love of peace ſhould equally prevent the beginning of war, without neceſſity, or continuing it when this neceſſity ceaſes. A ſovereign who, for a juſt and important

important cauſe has been obliged to take arms, may puſh the operations of a war till he has attained its lawful end; which is to procure juſtice and ſafety (Book III. Sect. 28.).

If the cauſe be dubious, the juſt end of war can be only to bring the enemy to an equitable accommodation (Book III. Sect. 38.) and conſequently can be continued no further. On the enemy's offering or accepting ſuch accommodation, a nation is to lay down its arms.

But if it has to do with a perfidious enemy, it would be imprudent to truſt either his words or his oaths; we may very juſtly, and prudence requires it, avail ourſelves of a ſucceſsful war, and puſh our advantages, till we have broken a dangerous and exceſſive power, or reduced the enemy to give us ſufficient ſecurity for his future good behaviour. In fine, if the enemy obſtinately rejects equitable conditions, he himſelf forces us to carry on our attacks to a total and definitive victory, by which he is abſolutely reduced and ſubjected. The uſe to be made of victory has been ſhewn above (Book III. Chap. VIII. IX. XIII.).

§ 7. Peace the end of war.

When one of the parties is reduced to ſue for peace, or both are weary of the war, an accommodation is propoſed, and conditions agreed on. Thus peace puts a period to the war.

§ 8. General effects of peace.

The general and neceſſary effects of peace are reconciliation of enemies, and the ceſſation of hoſtilities on both ſides: it reſtores the two nations to their natural ſtate.

CHAP.

CHAP. II.

Of Treaties of Peace.

§ 9. Definition of a treaty of peace.

WHEN the powers at war have agreed to lay down their arms, the agreement or contract in which they ſtipulate the conditions of peace, with the manner in which it is to be reſtored and ſupported, is called the *Treaty of Peace.*

§ 10. By whom it may be concluded.

The ſame power who has the right of making war, of declaring or directing its operations, has naturally that likewiſe of making and concluding the treaty of peace. Theſe two powers are connected together, and the latter naturally follows from the former. If the conductor of the ſtate is impowered to judge of the cauſes and reaſons for which war is to be undertaken; of the time and circumſtances when it is proper to begin it; of the manner in which it is to be ſupported and carried on; he therefore has likewiſe a right to limit its courſe, to appoint the end of it, and to make peace. But this power does not neceſſarily include that of offering or accepting any conditions with a view of peace; though the ſtate has intruſted to the prudence of its conductor the general care of determining war and peace, yet the fundamental laws may have limited his power in many things. Accordingly Francis Iſt King of France had an abſolute diſpoſal of war and peace, yet in the aſſembly at Cognac he declared, that to alienate, by a treaty of peace, any part of the kingdom, was out of his power (See Book I. Sect. 265.).

A nation having the free diſpoſal of its domeſtic affairs, and of the form of its government, may commit to a perſon or an aſſembly, the power of making peace, without leaving it alſo that of making war. Of this we have an

an inſtance in Sweden; where, ſince the death of Charles XII. the king cannot declare war without the conſent of the ſtates aſſembled in a diet: but he may make peace in conjunction with the ſenate. It is leſs dangerous for a people to intruſt its conductors with this laſt power, than with the former. It may reaſonably be expected that they will not make peace till it ſuits with the intereſt of the ſtate. But their paſſions, their own intereſt, their private views, too often influence their reſolutions when a war is in queſtion. Beſides, a peace muſt be wretched indeed, not to be better than war. On the contrary, to exchange peace for war is always very hazardous.

When a limited power is authorized to make peace, as he cannot of himſelf grant every condition, in order to treat on ſure grounds with him, it muſt be required that the treaty of peace be approved by the nation or the power which can make good the conditions. If for inſtance, in treating of a peace with Sweden a defenſive alliance and a guarantee be required for the condition, this ſtipulation will be of no effect, unleſs approved and accepted of by the diet, which alone has the power of imparting validity to it. The Kings of England conclude treaties of peace and alliance, but by theſe treaties, they cannot alienate any of the poſſeſſions of the crown without the conſent of parliament; neither can they, without the concurrence of the ſame body, raiſe any money in the kingdom. Therefore when they negociate any treaty of ſubſidies, it is their conſtant rule to communicate the treaty to the parliament, that they may be certain of its concurrence to make good ſuch engagements. The Emperor Charles V. requiring of Francis I. his priſoner, ſuch conditions as this King could not grant without the conſent of the nation, ſhould have detained him till the treaty of Madrid had been approved of by the ſtates-general of France, and Burgundy had acquieſced

acquieſced in it: thus he would not have loſt the fruit of his victory by an overſight, very ſurpriſing in a prince of his capacity.

§ 11. Of alienations made by a treaty of peace.

We ſhall not here repeat what we have ſaid above concerning the alienation of a part of the ſtate (Book I. Sect. 263, &c.) or of the whole ſtate (ibid. Sect. 68. &c.) only let us obſerve that, in caſe of a preſſing neceſſity, and the events of an unfortunate war, the alienations made by the prince for ſaving the remainder of the ſtate, are conſidered as approved and ratified by the mere ſilence of the nation, when, in the form of its government, it has not retained ſome eaſy and ordinary method of giving its expreſs conſent, and has lodged an abſolute power in the prince's hands. The ſtates-general are aboliſhed in France, by long uſe and the tacit conſent of the nation: therefore, in any calamitous exigency, the King alone is judge by what ſacrifices peace is to be purchaſed, and his enemies treat on a ſure footing with him. It would be a vain plea in the people to ſay, that it was only through fear that they had ſuffered the aboliſhment of the ſtates-general. However, they have ſuffered it, and thereby all the neceſſary powers for contracting with foreign ſtates in the name of the nation, are transferred to the King. In every nation there muſt neceſſarily be ſome power with which others may treat on a ſecure baſis. A certain hiſtorian [a] ſays, *that by the fundamental laws the Kings of France may not renounce any of their rights, to the prejudice of their ſucceſſors, by treaties, either free or forced.* The fundamental laws may indeed withhold from the King the power of alienating, without the nation's conſent, what belongs to the ſtate; but they cannot invalidate an alienation or renunciation made with that conſent. And if a nation has permitted things

[a] L'Abbé de Choiſy, Hiſtoire de Charles V. p. 492.

to

to come to ſuch extremities as to leave it without any means of expreſsly declaring its conſent; on theſe occaſions its ſilence alone is a real tacit conſent. Otherwiſe there would be no ſuch thing as treating on ſure grounds with ſuch a ſtate: and thus previouſly to vacate all future treaties would be countervening the law of nations, by which the means of treating together are to be retained (Book I. Sect. 262.) and their treaties to be obſerved (Book II. Sect. 163, 219, &c.). In fine, it muſt be obſerved that, in our examination, whether the conſent of the nation be requiſite for alienating ſome part of the ſtate, we mean ſuch parts as are ſtill belonging to the nation, and not any which during the war are fallen under the power of the enemy. For theſe being no longer poſſeſſed by the nation, the ſovereign alone, if inveſted with the full adminiſtration of the government, the power of war and peace; he alone, I ſay, may judge whether it be convenient to relinquiſh thoſe parts of the ſtate, or to continue the war for the recovery of them. And though it ſhould be pretended that he cannot of himſelf make any valid alienation; yet according to our ſuppoſition, that is, if inveſted with a full and abſolute power, he has, I ſay, a right to promiſe that the nation ſhall not take up arms again for the recovery of thoſe lands, towns, or provinces, which he relinquiſhes: and this ſuffices for ſecuring the quiet poſſeſſion of them to the enemy into whoſe hands they are fallen.

§ 12. How the ſovereign may in a treaty diſpoſe of what concerns individuals.

The neceſſity of making a peace authoriſes the ſovereign to diſpoſe of things even belonging to private perſons, and the eminent *Domain* gives him this right (Book I. Sect. 244.). In ſome degree, by virtue of the power which he has over all his ſubjects, he may diſpoſe of their perſons. But theſe ceſſions being made for the common advantage, the ſtate is to indemnify the citicens who are ſufferers by them (ibid.)

Every

§ 13. Whether a king being a priſoner of war, can make peace.

Every impediment by which the prince is diſabled from adminiſtering the affairs of the government, undoubtedly takes away from him the power of making peace. Thus a king, when a minor or non compos, cannot treat of peace: this ſtands in need of no proof. But the queſtion is, whether a king when priſoner of war can make peace, and whether a treaty thus concluded be valued? Some authors of repute [a] here diſtinguiſh betwixt a king whoſe kingdom is patrimonial, and another who has only the *uſu fructus* of it. This falſe and dangerous idea of a patrimonial kingdom we have overthrown (Book I. Sect. 68, &c.) and evidently ſhewn it reducible only to the power the ſovereign is intruſted with, of nominating his ſucceſſor, and when he judges it proper, to diſmember ſome parts of it: but always for the good of the nation, and with a view to its greater advantage. Every legitimate government, whatever it be, is eſtabliſhed ſolely for the good and welfare of the ſtate: this inconteſtable principle being once laid down, peace is no longer the peculiar province of the king; it belongs to the nation. Now it is certain that a captive prince cannot rule the nation, or perform the functions of government. How ſhall he who is not free command a nation? How can he govern it to the advantage of the people, and for the public welfare? He does not indeed forfeit his rights, but his impriſonment deprives him of the ability of exerciſing them; not being in a condition to direct the uſe of them, to their proper and legal end. It is the ſame caſe as that of a king who is a minor, or under a diſorder of mind; then he or they who by the laws of the ſtate are called to the regency, take the reins of government; they are, by the laws, inveſted with a power to treat of peace, to ſtipulate the conditions, and to bring it to a legal concluſion.

[a] Vide Wolf. Jus. Gent. Sect. 982.

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The captive ſovereign may negociate it himſelf, and promiſe what depends on him perſonally; but the treaty does not become obligatory to the nation till ratified by its repreſentatives, or the depoſitaries of the public authority during the captivity of the prince; or, laſtly, by himſelf after his releaſe.

However, if the ſtate is, as far as poſſible, to procure the releaſe of the leaſt citizen, who has loſt his liberty for the public cauſe, this obligation is much towards its conductor, whoſe cares, attention, and labours are devoted to the common ſafety and welfare. It is in fighting for his people that a prince, made priſoner of war, is fallen into a condition, which to a perſon of ſuch an exalted rank is the depth of miſery; and ſhall this ſame people grudge any ſacrifice to deliver him? On ſo melancholy an occaſion, nothing leſs than the very ſafety of the ſtate is to be ſpared. But in every exigency the ſafety of the people is the ſupreme law; and in ſo ſevere an extremity a generous prince will imitate the example of the heroic Regulus. This hero, who being ſent back to Rome on his parole, diſſuaded the Romans from delivering him by a ſcandalous treaty, though he was not ignorant of what tortures he ſhould ſuffer on his return, from the illegal cruelty of the Carthaginians. [a]

§ 14. Whether peace can be made with an uſurper.

When an unjuſt conqueror, or any othe uſurper, having invaded the kingdom, on the people ſubmitting to him, and by a voluntary homage acknowledging him for their ſovereign, he is in poſſeſſion of their regality. Other nations, as having no right to concern themſelves in the domeſtic affairs of this nation, or to interfere in its government, are to abide by its judgment, and conform to the poſſeſſion; therefore they may treat of a peace with the uſurper, and conclude it with him. Herein they do not injure the right of that lawful ſovereign; it is not their concern to examine and judge of this right; they leave it

[a] Tit. Liv. Epitom. Lib. XVIII. and other hiſtorians.

as it is, and in their tranſactions with this kingdom, attach themſelves ſolely to the poſſeſſion, according to their own right, and that of the ſtate whoſe ſovereignty is conteſted. But this rule does not preclude them from eſpouſing the quarrel of a dethroned king, and aſſiſting him if he appears to have juſtice on his ſide: they then declare themſelves enemies of the nation which has acknowledged his rival, as when two different nations are at war, they are at liberty to aſſiſt that whoſe quarrel they ſhall think has the faireſt appearance.

§ 15. Allies included in the treaty of peace.

The principal party, the ſovereign, in whoſe name the war was made, cannot juſtly make a peace excluſively of his allies: I mean thoſe who have aſſiſted him, not directly taking part in the war. This is a precaution neceſſary for ſecuring them from the enemy's reſentment; for though one party is not to be offended with the allies of its adverſary, who being engaged only on the defenſive, faithfully make good their treaties (Book I. Sect. 101.); yet is it too common that paſſions determine the meaſures of men preferably to juſtice and reaſon. If theſe allies are become ſuch only ſince the war, and on account of this ſame war, though they do not enter into it with their forces, nor directly as principals, yet they give him againſt whom they join, a juſt cauſe to treat them as enemies; he therefore whom they have thus aſſiſted, is not to omit including them in the peace.

But the treaty of the principal party obliges its allies no farther than as they are willing to conſent to it; unleſs they have given him full power to treat for them. By comprehending them in his treaty, all he can require of his reconciled enemy is not to attack his allies on account of the ſuccours they furniſhed againſt him; not to moleſt them, but to live in peace with them as if nothing had happened.

§ 16. Aſſociates each to treat for himſelf.

Sovereigns who have aſſociated in a war, or who have directly taken part in it, are reſpectively to make their treaty of peace each for himſelf: this was the practice at Nimeguen,

Nimeguen, Reiſwick, and at Utrecht. But the alliance obliges them to treat in concert. To know in what caſes an aſſociate may detach himſelf from the alliance, and make his ſeparate particular peace, is a queſtion which we have examined in treating of aſſociations in war (Book III. Chap. VI.) and of alliances in general (Book. II. Chap. XII. and XV.).

§ 17. Of mediation.

Two nations, though equally weary of the war, often continue it merely from a fear of making the firſt advances to an accommodation, as theſe might be imputed to weakneſs; or they perſiſt in it from animoſity, and againſt their real intereſt. Then common friends effectually interpoſe, offering themſelves for mediators. And there cannot be a more beneficent office, and more becoming a great prince, than that of reconciling two nations at war, and thus putting a ſtop to the effuſion of human blood. This is an indiſpenſable duty to thoſe who are poſſeſſed of the means for ſucceeding in it. This is the only reflection we ſhall make here on a ſubject we have already diſcuſſed (Book II. Sect. 328.).

§ 18. On what footing peace is to be concluded.

A treaty of peace can be no more than an agreement. Were the rules of an exact and preciſe juſtice to be obſerved in it, each punctually receiving all that belongs to him, a peace would become impoſſible. Firſt, with regard to the very ſubject which occaſioned the war, one of the parties muſt acknowledge himſelf in the wrong, and condemn his own unjuſt pretenſions; which he will hardly do, unleſs reduced to the laſt extremities: but if he owns the injuſtice of his cauſe, all he has done in ſupport of it, falls likewiſe under condemnation. He muſt reſtore what he has unjuſtly taken, muſt reimburſe the charges of the war, and repair its damages. And how ſhall we make a juſt eſtimate of all the damages; what price is to be ſet on all the blood that has been ſhed, the loſs of ſuch great numbers of citizens, and the ruin of families? Nor is this all, ſtrict juſtice would farther demand, that the author of an

unjuſt war ſhould undergo a penalty proportionable to the injuries for which he owes a ſatisfaction, and ſuch as might inſure the future ſafety of him whom he has attacked. How ſhall the nature of this penalty be determined, and the degree of it be preciſely regulated? In fine, even he who had juſtice on his ſide may have tranſgreſſed the limits of a juſt defence, may have exceeded in hoſtilities, though the end of them was lawful: wrongs for which ſtrict juſtice would demand a reparation. He may have made conqueſts and taken a booty beyond the value of his claim. Who ſhall make an exact calculation, a juſt eſtimate of this? Thus, as it would be dreadful to perpetuate the war, to proſecute it till the total ruin of one of the parties, and as in the moſt juſt cauſe we are never to loſe ſight of the reſtoration of peace, are conſtantly to tend towards this ſalutary view, no other way is left than to agree on all the claims and grievances on both ſides, and to extinguiſh all differences by the moſt equitable convention which the juncture will admit of. Not ſo much as the cauſe of the war is decided in them, nor the controverſies to which the ſeveral acts of hoſtilities might give riſe; and neither one nor other of the parties condemned as unjuſt. This is what would ſeldom be allowed: but the negotiations turn only on what each is to have as a total extinction of all pretenſions.

§ 19. General effect of the treaty of peace.

The effect of the treaty of peace is to put an end to the war, and to aboliſh the ſubject of it. It leaves the contracting parties without any rights of committing hoſtility, either for the very ſubject which kindled the war, or for what has paſſed in the courſe of it: it is therefore no longer permitted to take up arms again for the ſame cauſe. Accordingly, in theſe treaties, the parties reciprocally oblige themſelves to a *perpetual peace*, which is not to be underſtood as if the contracting parties promiſed never to make war on each other, for any cauſe whatever. Peace relates to the war which it terminates; and as it forbids the revival

val of the ſame war by taking arms for the cauſe which at firſt kindled it, is in reality perpetual.

However, the ſpecial agreement on a cauſe extinguiſhes only the mean to which it relates, and is no objection againſt any ſubſequent pretenſions to the ſame thing on other foundations: care is therefore uſually taken to require a general agreement to the thing itſelf in conteſt, and not merely to the conteſt depending. A general renunciation of every pretenſion whatſoever to the thing in queſtion is ſtipulated for: and thus, though the party renouncing might hereafter be able to demonſtrate by new reaſons that the thing did really belong to him, his claim would not be admitted.

§ 20. Of an amneſty.

An amneſty is a perfect oblivion of what is paſt; and the end of peace being to extinguiſh all ſubjects of diſcord, this ſhould be the leading article of the treaty. This accordingly at preſent is the conſtant rule. But though the treaty ſhould be wholly ſilent on this head, the amneſty, by the very nature of peace, is neceſſarily implied in it.

§ 21. Of things not mentioned in the treaty.

As every power at war pretends to have right on its ſide, and this pretenſion is not liable to be judged by others (Book III. Sect. 188.) the ſtate of things at the inſtant of the treaty is to be held legitimate, and any change to be made in it requires an expreſs ſpecification in the treaty; conſequently all things not mentioned in the treaty are to remain as they were at the concluſion of it. This is alſo a conſequence of the promiſed amneſty. All the damages cauſed during the war are likewiſe buried in oblivion; and no plea is allowable for thoſe the reparation of which is not mentioned in the treaty, they are looked on as if they had never happened.

§ 22. Of things not included in the amneſty.

But the effect of the agreement or amneſty cannot be extended to things of no relation to the war, concluded by the treaty. Thus claims founded on a debt, or an injury prior to the war, but which made no part of the reaſons for undertaking it, remain intire, and are not aboliſhed by the treaty,

treaty, unleſs it be formally extended to the extinction of every claim whatever. It is the ſame with debts contracted during the war, but for cauſes of no relation to it: or with injuries likewiſe done during the courſe of the war, but foreign to the ſtate of it.

Debts contracted with individuals, or injuries which they may have received without relating to the war, are likewiſe not aboliſhed by the agreement and amneſty; theſe relating only to their object, that is, the war, its cauſes and effects. Thus two ſubjects of powers at war having made a contract together in a neutral country, or one having received there an injury from the other, the accompliſhment of the contract or the reparation of the injury and damage may be proſecuted after the concluſion of the treaty of peace.

Laſtly, if the treaty expreſſes that all things ſhall be reſtored to the ſtate in which they were before the war, this clauſe means only immoveables, and cannot be extended to moveables, to booty, the property of which immediately paſſes to thoſe who make themſelves maſters of it; and, on account of the difficulty of knowing it again, and of the little hopes of recovering it, is accounted to be relinquiſhed by the former proprietor.

§ 23. Former treaties revived and confirmed in the new are a part of it.

Preceding treaties mentioned and confirmed in the laſt, make a part of it; no leſs than if they were literally included and tranſcribed in it: and any new articles relating to former conventions are to be interpreted according to the rules above-mentioned (Book II. Chap. 17.) and particularly in paragraph 286.

CHAP.

CHAP. III.

Of the Execution of the Treaty of Peace.

§ 24. When the obligation of the treaty commences.

A TREATY of peace binds the contracting parties from the moment of its concluſion; as ſoon as it had paſſed through all its forms. And they are without delay to procure the execution of it. From that time all hoſtilities ceaſe, unleſs a day be ſpecified when the peace is to take place. But this treaty becomes obligatory to ſubjects only from the time of its being notified to them. It is here as in a truce (Book III. Sect. 239.). Should military perſons commit ſome hoſtilities within the extent of their functions, and purſuant to the rules of their duty, before they have any authentic information of the treaty of peace, it is a misfortune for which they are not puniſhable; but the ſovereign, who was before obliged to peace, is to cauſe whatever has been taken ſince the concluſion to be reſtored: he has no manner of right to any detention.

§ 25. Publication of the peace.

And for preventing thoſe unhappy accidents, by which many innocent perſons may loſe their lives, public notice is to be given of the peace without delay, at leaſt to the troops. But at preſent, as the people cannot of themſelves undertake any act of hoſtility, and do not concern themſelves in the war, the ſolemn proclamation of the peace may be deferred, care being taken that all hoſtilities ceaſe, which is eaſily done by means of the generals who direct the operations, or by proclaiming an armiſtice at the head of the armies. The peace in 1735, betwixt the emperor and France was not proclaimed till a long time after, being delayed till the treaty was maturely digeſted; the moſt important points having been adjuſted in the preliminaries. The publication of the peace replaces the two nations

nations in the ſtate they were in before the war. It again opens a free trade betwixt them, and allows to the ſubjects on both ſides what had been interdicted to them by the ſtate of war. On the publication the treaty becomes a law to the ſubjects, and they are obliged to conform to the articles ſtipulated therein. If, for inſtance, the treaty imports that one of the two nations ſhall abſtain from a particular trade, every ſubject of that nation, from the time of the treaty's being made public, is to renounce that trade.

§ 26. Of the time of the execution.

When no term is aſſigned for the accompliſhment of the treaty, and the execution of the ſeveral articles, common ſenſe dictates that every point ſhould be executed as ſoon as poſſible; and doubtleſs this was ſo intended. The faith of treaties equally excludes from the execution of them all neglect, all dilatorineſs, and deliberate delays.

§ 27. A lawful excuſe to be admitted.

But here, as every where elſe, a legitimate excuſe, founded on a real and inſurmountable obſtacle, is to be admitted; no body being bound to impoſſibilities. The obſtacle, when the promiſe is not in fault, vacates a promiſe which cannot be made good by an equivalent, nor the performance of it be referred to another time: if the promiſe can be fulfilled on another occaſion, a proper delay muſt be granted. A nation has by treaty of peace promiſed to the other a body of auxiliary troops, yet ſhould the former happen to ſtand in urgent need of them for her own defence, ſhe is not bound to furniſh them: if ſhe has promiſed a certain yearly quantity of corn, it cannot be demanded ſhould ſhe labour under a ſcarcity, but, on the return of plenty, ſhe is, if required, to make up the arrears.

§ 28. The promiſe is at an end when the party to whom it is made, himſelf hinders the performance of it.

A farther maxim is, that the promiſer is cleared of his promiſe, when being about to fulfil it, according to the terms of the engagement, he to whom it was made has himſelf hindered the execution of it. He is accounted to remit a promiſe, who himſelf hinders its execution. It muſt

muſt be likewiſe added, that if he who promiſed a thing by a treaty of peace, was ready to perform it at the time agreed on, or immediately, or at a proper time, if there was no fixed term; and that the other party would not admit of it, the promiſer is diſcharged of his promiſe; for the accepter, who has not reſerved to himſelf the right of fixing the execution at his pleaſure, is accounted to renounce it by not accepting of it at a proper time, and for which the promiſe was made. Should he deſire that the performance he deferred till another time, the promiſer in good faith ſhould conſent to the prolongation, unleſs he can ſhew, by very good reaſons, that the promiſe would then become more inconvenient.

§ 29. Ceſſation of contributions.

To raiſe contributions is an act of hoſtility, which, on the concluſion of the peace, is to ceaſe (Sect. 24.). Thoſe before promiſed, and not yet paid, are due, and may be required as a debt. But for avoiding all difficulty, theſe kinds of articles are to be clearly and particularly diſcuſſed, and care is generally taken that they are ſo.

§ 30. Of the products of the thing reſtored or ceded.

The products reſtored on a peace are due from the inſtant fixed for the execution; if there be no fixed term the products are due from the moment the reſtitution of the things was granted; but thoſe which were due or collected before the concluſion of the peace, are not to be delivered up; for the fruits belong to the proprietor of the ſtock, and here poſſeſſion is accounted a lawful title. From the ſame reaſon the ceſſion of a fund does not imply that of the produce anteriorly due. This Auguſtus juſtly maintained againſt Sextus Pompeius, who, on having the Peloponneſus given to him, claimed the impoſts of the former years [a].

§ 31. In what condition things are to be reſtored.

Things, the reſtitution of which is in the treaty of peace, ſtipulated ſimply without any explication, are to be reſtored in the condition they were taken, the word reſtitution naturally ſignifying the re-eſtabliſhment of all things to their

[a] Appian de Bell. Civ. Lib. V. quoted by Grotius, Lib. II. Cap. XX. Sect. 22.

former

former condition. Thus the reſtitution of a thing is to be accompanied with all the rights annexed to it when taken: but under this rule are not to be comprehended the alterations which may have been a natural conſequence, an effect of the war itſelf, and of its operations. A place is to be reſtored in the condition it was in when taken, as far it ſhall be ſtill in that condition, at the concluſion of the peace. But if during the war the place has been razed or diſmantled, this was no more than the right of arms; and the amneſty extinguiſhing this damage, there is no obligation of repairing a ravaged country on reſtoring it at a peace: it is reſtored as it is. But it would be a flagrant perfidy to waſte this country after the concluſion of the peace; it is the ſame with a place whoſe fortifications have eſcaped the deſtructions of war; to diſmantle it previouſly to the reſtitution of it would be an infamous prevarication. If the conqueror has repaired the breaches, has put it in the condition it was in before the ſiege, in this condition he is to reſtore it; indeed if he has added any new works, theſe he may demoliſh. If he has razed the antient fortifications, and conſtructed others, it will be neceſſary to agree about this improvement, and preciſely to ſtate in what condition the place ſhall be reſtored. It is even proper for preventing all chicane and difficulty, never to omit this laſt precaution. An inſtrument appointed for reſtoring peace ſhould leave, as far as poſſible, nothing which may rekindle the war; this, I know, is not the method of thoſe who at preſent account themſelves the moſt dexterous negociators. They, on the contrary, ſtudy to inſinuate into a treaty of peace obſcure or ambiguous clauſes, that their maſter may have a pretence for a freſh quarrel, and of taking up arms again. How contrary this wretched fineſſe is to the faith of treaties, we have already obſerved (Book II. Sect. 231.) it is unworthy of that candour and magnanimity which ſhould adorn the actions of a prince.

But

§ 32. The interpretation of a treaty of peace is to be againſt the ſuperior party.

But it being very difficult, though the treaty be drawn up with the greateſt care and candour, to avoid all manner of ambiguity, or that ſome difficulty ſhall not occur in the application of its clauſes to particular caſes, recourſe muſt often be had to the rules of interpretation. We have beſtowed a whole chapter on the expoſition of theſe important rules [b], and now, inſtead of repetitions, I ſhall only mention ſome rules more particularly relative to the point in queſtion, I mean the interpretation of treaties of peace. 1. In caſe of doubt the interpretation goes againſt him who gave law in the treaty; for as it was in ſome meaſure dictated by him, he is in fault in neglecting to expreſs himſelf more clearly; therefore in extending or reſtraining the ſignification of the terms within the meaning, the leaſt favourable to him, no injury is done him, or at leaſt only that to which he has willingly expoſed himſelf; whereas, by a contrary interpretation, there would be a riſque of turning vague or ambiguous terms into ſo many ſnares againſt the weakeſt contractor, who has been obliged to accept of what the former dictated.

§ 33. Of the name of ceded countries.

2. The name of countries ceded by treaty is to be underſtood according to the uſage then received among men of parts and capacity; for it is not to be ſuppoſed that weak and ignorant perſons will be employed in ſuch a concern as a treaty of peace: and the articles of a contract are to be underſtood of what the contractors probably had in their mind, it being for what they have in their mind that they contract.

§ 34. Reſtitution not to be underſtood of thoſe who have voluntarily given themſelves up.

3. The treaty of peace naturally and of itſelf relates only to the war, which it puts an end to. Therefore it is only in ſuch relation that its vague clauſes are to be underſtood. Thus the ſimple ſtipulation of reſtoring things to their condition does not relate to changes which have not been occaſioned by the war itſelf; conſequently this general

clauſe cannot oblige one of the parties to ſet at liberty a free people who have voluntarily given themſelves up during the war. And as a people, when relinquiſhed by its ſovereign, becomes free, and may provide fot its ſafety as it thinks beſt (Book I. Sect. 202.) if this people, in the courſe of the war has of their own accord, without any military compulſion, ſubmitted or given themſeves up to the enemy of their former ſovereign, the general promiſe of reſtoring conqueſts ſhall not extend to this people. It is to no purpoſe to ſay, the freedom of the firſt mentioned people may concern him, who requires that all things ſhould be reſtored on its antient footing, and that the reſtoration of the ſecond is manifeſtly of very great concern to him. If he wanted what the general clauſe does not comprehend in itſelf, he ſhould have been more clear and expreſs in his terms. All kinds of conventions may be inſerted in a treaty of peace; but if they bear no relation to the war which is now terminating, they muſt be very expreſsly ſpecified; for the treaty is naturally underſtood only of its object.

CHAP.

CHAP. IV.

Of the Obſervation and Breach of the Treaty of Peace.

§ 35. The treaty of peace obliges the nation and ſucceſſors.

THE treaty of peace concluded by a lawful power is undoubtedly a public treaty, obligatory to the whole nation (Book II. Sect. 154.). It is likewiſe, by its nature, a real treaty; were it made only for the prince's life, it would be no more than a treaty of truce, and not of peace; beſides, every treaty which, like this, is made with a view to the public good is a real treaty (Book II. Sect. 189.). Therefore it obliges ſucceſſors, no leſs than the prince himſelf who ſigned it, ſince it obliges the ſtate itſelf, and ſucceſſors can never have, in this reſpect, any other rights than thoſe of the ſtate.

§ 36. Is to be faithfully obſerved.

After all we have ſaid on the faith of treaties, and the indiſpenſable obligation of them, it would be ſuperfluous to uſe many words in ſhewing how religiouſly treaties of peace are to be obſerved both by ſovereigns and people. Theſe treaties concern and bind whole nations, they are of the utmoſt importance; the breach of them certainly rekindles the war: reaſons which add a new force to the obligation of keeping our faith, and punctually fulfilling our promiſes.

§ 37. The plea of fear or force does not diſcharge from them.

To alledge that a treaty of peace was complied with through fear, or extorted by force, does not invalidate the obſervance. Firſt, were this exception admitted, it would ſap the very foundations of all ſecurities and conventions; there being very few which might not be made to afford ſuch a pretence. To authoriſe ſuch an evaſion would be to hurt the common ſafety and welfare of nations: the maxim would be execrable by the very ſame reaſons which have univerſally eſtabliſhed the ſacredneſs of treaties (Book II.

II. Sect. 220.). Beſides, to alledge ſuch an exception would generally be diſgraceful and ridiculous. It is ſeldom even in our days that a ſtand is made to the laſt extremities, before making a peace. A nation after the loſs of ſeveral battles may ſtill defend itſelf; whilſt it has men and arms remaining it is not without reſource. If it thinks fit, by a diſadvantageous treaty, to procure itſelf a neceſſary peace; if by great ſacrifices it delivers itſelf from an imminent danger or total ruin, what ſtill remains is a good which it owes to peace; it has freely determined itſelf to prefer a certain and preſent, but limited loſs, to a danger, indeed to come, but too probable and very terrible.

If ever the exception of conſtraint may be alledged, it is againſt an act which does not deſerve the name of a treaty of peace, againſt a forced ſubmiſſion to conditions equally offenſive to juſtice and all the duties of humanity. If a rapacious conqueror ſubdues a nation, forces it to accept of hard, ignominious and inſupportable conditions, neceſſity then obliges it to a ſubmiſſion. But this apparent quiet is no peace; it is an oppreſſion endured, whilſt means are wanting for ſhaking it off, and againſt which men of ſpirit riſe on the firſt favourable opportunity. When Ferdinand Cortes fell on the empire of Mexico without any ſhadow of reaſon, without the leaſt apparent pretence; if the unfortunate Montezuma could have recovered its liberty by ſubmitting to the iniquitous and cruel conditions of receiving a Spaniſh garriſon into his towns, and his capital, of paying an immenſe tribute, and obeying the King of Spain's orders; will it ſeriouſly be ſaid that he might not lay hold of an opportunity for reinſtating himſelf in his rights, and delivering his people; for exterminating ravenous and ſanguinous uſurpers? No, ſuch a monſtrous abſurdity can never meet with any real defenders. The law of nature taking care of the ſafety and repoſe of nations, and enjoining fidelity in promiſes, cannot favour oppreſſors.

All

All its maxims tend to the greateſt good of mankind: that is, the great end of laws and rights. He who himſelf breaks all the bounds of human ſociety, ſhall he ſhelter himſelf under them; If a people abuſes this maxim, riſes unjuſtly and renews the war, this inconveniency is ſtill more eligible than that uſurpers ſhould be furniſhed in an eaſy way of perpetuating their violences, and ſettling their uſurpations on a ſolid foundation. But were this doctrine, ſo contradictory to all the motions of nature, to be preached, who would be brought to believe it?

§ 38. How many ways a treaty of peace may be broke.

Therefore equitable or at leaſt ſupportable agreements alone deſerve the appellation of treaties of peace; they are ſuch wherein the public faith is engaged, and which are faithfully to be obſerved, though in ſome reſpects harſh and burdenſome. The conſent of the nation to it ſhews that in the condition it was in, ſtill conſidered it as a good, and its word demands its reſpect. Were men allowed to undo at one time what they do at another, there would be an end of all ſtability and confidence.

To break a treaty of peace is to violate the engagements of it, either in doing what it prohibits, or in not doing what it preſcribes. Now engagements in a treaty may be violated in three different manners: either by a conduct contrary to the nature and eſſence of every treaty of peace in general; by proceedings incompatible with the particular nature of the treaty; or by an intentional breach of any of its articles.

§ 39. Firſt, by a conduct contrary to the nature of every treaty of peace.

Firſt, a nation acts againſt the nature and eſſence of every treaty of peace, nay againſt peace itſelf, in diſturbing it without cauſe, either by taking arms and renewing the war without ſo much as a plauſible pretence, or in deliberately and wantonly offending him with whom peace has been made; and treating him or his ſubjects in a manner incompatible with peace, and which he cannot ſuffer without being wanting to himſelf. It is likewiſe acting againſt the nature of all treaties of peace to take arms for the

the ſame cauſe which had recently terminated the war, or in reſentment of ſome occurrence during the hoſtilities. If, at leaſt, ſome ſpecious pretence, borrowed from a freſh cauſe, cannot be pleaded, there is a manifeſt revival of the war which had been terminated, and the treaty of peace is flagrantly broken.

§ 40. To take arms for a freſh cauſe is no breach of the treaty of peace.

But to take arms for a ſubſequent cauſe is not breaking the treaty of peace; for though a promiſe has been given to live in peace, it was not therein promiſed to ſuffer injuries, damages and wrongs of all kinds, rather than procure juſtice by force of arms. The rupture proceeds from him, who, by his obſtinate injuſtice, renders this method neceſſary.

But here muſt be remembered what we have obſerved more than once, namely, that nations acknowledge no common judge on earth, that they can mutually condemn each other without appeal, and that they are at laſt obliged to act in their quarrels as if each was equally in the right. On this footing, whether the new cauſe occaſioning the war be juſt or not; neither he who makes it a handle for taking up arms, nor he who refuſes ſatisfaction, is reputed to break the treaty of peace, provided the cauſe of complaint and the refuſal of ſatisfaction have reſpectively ſome colour at leaſt, ſo as to render the queſtion controvertible; and when nations can come to no accommodation about the point in diſpute, the only way remaining to them is that of arms. Then it becomes a freſh war abſtractedly from the treaty.

§ 41. A ſubſequent alliance with an enemy is likewiſe no breach of a treaty.

And, as in making peace a nation does not thereby give up its right of making alliances, and aſſiſting its friends, it is likewiſe no breach of the treaty of peace, if to make a ſubſequent alliance with, and join the enemies of him with whom ſuch treaty was concluded, to eſpouſe their quarrel and unite its arms with theirs, unleſs the treaty expreſsly prohibits ſuch connections. It is at moſt but beginning a freſh war in behalf of a foreign cauſe.

But

But theſe new allies I ſuppoſe have ſome ſpecious pretence for taking arms, and that there are good and juſt reaſons for ſupporting their quarrel. Otherwiſe to unite with them, juſt as they are entering on the war, or when they have begun it, would be manifeſtly ſeeking a pretence to elude the treaty of peace; would be breaking it by a fraudulent perfidy.

§ 42. Why a diſtinction is to be made betwixt a new war and the breach of the treaty.

It is of great importance that a new war ſhould be diſtinguiſhed from the breach of a treaty of peace; the rights acquired by ſuch treaty ſtill ſubſiſting, notwithſtanding the new war; whereas they are annulled by the breach of the treaty on which they were founded. Indeed he who had ceded theſe rights unqueſtionably, during the war interrupts as far as in his power, the exerciſe of them, and he may, by the law of war, intirely wreſt them from his enemy, as he may his other poſſeſſions. But then he holds theſe rights as things taken from the enemy, who, on a new treaty of peace, may urge the reſtitution of them. In theſe kinds of negotiations the difference is very great betwixt demanding the reſtitution of what we were poſſeſſed of before the war, and requiring new conceſſions: any little equality in the ſucceſſes ſuffices for inſiſting on the former; the latter is obtainable only by a ſuperiority. It often happens that when the fate of arms has been nearly equal, both ſides agree to reſtore their conqueſts, and put every thing in its former condition. And then, if it was a new war, the former treaties ſubſiſt: but if they have been broken by taking up arms again, and the firſt war be revived, theſe treaties continue vacated, and in order to the revival of their force, they muſt be expreſsly ſpecified and confirmed in the new treaty.

The queſtion we are treating of alſo greatly concerns other nations, which may be ſo far intereſted in the treaty that their own affairs require them to maintain its obſervance. To guaranties of the treaty, if there are any, it is eſſential, as likewiſe to allies, for diſtinguiſhing the caſe

when their ſuccours are due. In fine he who breaks a ſolemn treaty is much more odious than the other, who, after making an ill-grounded demand, ſupports it by arms. The former adds perfidy to injuſtice: he ſtrikes at the foundation of public tranquillity; and as he thereby injures all nations, they have juſt cauſe of uniting againſt him, to check and puniſh ſo pernicious an example. Therefore as we are to be reſerved in imputing to another what is moſt odious, Grotius juſtly obſerves, that in caſe of doubt, and when the taking up arms can be vindicated by ſome ſpecious pretence founded on a now cauſe; *it is better to ſuppoſe, in the fact of him who takes up arms again, an injuſtice or ſeparate perfidy, than to account him at once guilty both of perfidy and injuſtice.* [a]

§ 43. A juſt ſelf-defence no breach of the treaty.

A juſt ſelf-defence does not violate the treaty of peace; it is a natural right, not to be renounced; and in promiſing to live in peace we promiſe no more than not to attack without cauſe, and to abſtain from injuries and violence. But there are two ways of defending ourſelves or our properties: ſometimes the violence admits of no other remedy than force; and then the uſe of it is intirely lawful. On other occaſions there are milder ways of obtaining reparation for the damage and injury; and the laſt ſhould always be preferred. Such is the conduct to be obſerved by two nations deſirous of maintaining peace, when the ſubjects of both ſides have broke out into ſome violence. Preſent force is checked and repelled by force. But in proſecuting the raparation of injuries and a juſt ſatisfaction, the ſovereign of the offenders is to be applied to: there is no following them into his country, and having recourſe to arms, till after a denial of juſtice. If there be reaſon to fear that the delinquents will eſcape, ar for inſtance, if unknown perſons, natives of a neighbouring country, have made an irruption into our territories, we have a right to purſue them, ſword in hand, into their own country till they are ſeized;

[a] Lib. III. Cap. XX. Sect. 28.

and

and provided we commit no hoſtilities againſt innocent perſons, their ſovereign can conſider our proceeding only as a juſt and legitimate defence.

§ 44. Of the cauſes of ruptures for the ſake of allies.

When the principal contracting party has included his allies in the treaty, their cauſe in this reſpect is common to him, and theſe allies are, equally with him, to enjoy all the conditions eſſential to a treaty of peace; ſo that whatever is capable of breaking the treaty, if committed againſt himſelf, breaks it equally in being committed againſt the allies which he has cauſed to be included in his treaty. If the injury be done to a new ally, or who is not included in the treaty, it may produce a freſh cauſe of war, but does not weaken the treaty of peace.

§ 45. 2d. a treaty is broken by what is oppoſite to its particular nature.

The ſecond method of breaking a treaty of peace is to do any thing contrary to what the particular nature of the treaty requires. Thus every proceeding contrary to friendſhip breaks a treaty of peace made with the expreſs condition of living henceforth like good friends. To favour a nation's enemies, to inſult its ſubjects, to moleſt its trade without reaſon, or without any grounds to prefer another nation to it: to refuſe aſſiſting it with proviſions when it may be conveniently done; to protect its factious or rebellious ſubjects, and ſhelter them: All theſe are proceedings evidently oppoſite to friendſhip. To theſe according to circumſtances may be added the following: To build fortreſſes on the frontiers of a ſtate, to expreſs a miſtruſt of it, to raiſe troops without making known the occaſion of it, and refuſe ſuch explanation, &c. But to ſhelter exiles, to receive ſubjects quitting their country without any intention of hurting it by their departure, but for the advantage of their private affairs; charitably to receive emigrants quitting their country to enjoy a freedom of conſcience; in ſuch proceedings there is nothing incompatible with the quality of friend. The particular laws of friendſhip are not to diſcharge us, according to the caprice of our friends, from the common duties we owe the reſt of mankind.

§ 46. 3d. by the violation of ſome article.

Laſtly, the peace is broken by the violation of any of the expreſs articles of the treaty. This third manner of breaking it is the moſt deciſive, the leaſt ſuſceptible of chicanery and evaſions. Whoever fails in engagements, as far as in him lies, annuls the contract; this is beyond all doubt.

§ 47. The violation only of one article breaks the whole treaty.

But it is aſked, whether the violation of one article only of the treaty may cauſe the total rupture of it? Some[a] here diſtinguiſh between the articles connected together, (*connexi*) and the ſeparate articles (*diverſi*) and pronounce, that though the treaty be violated in the *ſeparate* articles, the peace ſubſiſts with regard to the other. But to me Grotius's opinion ſeems evidently founded on the nature and ſpirit of treaties of peace. This great man ſays, "That "all the articles of one and the ſame treaty are conditionally included in one another, as if it had been formally "ſaid: I will do this, provided on your ſide you do that[b]." And he juſtly adds, that "when it is deſigned that the engagement ſhall not be rendered ineffectual thereby, this "expreſs clauſe is inſerted: That though any one of the "articles of a treaty ſhould be broken, the others nevertheleſs ſhall ſubſiſt in their whole force." Such an agreement may unqueſtionably be made. It may likewiſe be agreed that the violation of one article ſhall produce only the nullity of thoſe correſponding to it, and which, as it were, conſtitute the equivalent to it. But if this clauſe be not expreſsly ſpecified in the treaty of peace, the violation of one ſingle article overthrows the whole treaty, as we have proved above, in ſpeaking of treaties in general (Book II. Sect. 202.).

§ 48. Whether a diſtinction may be made here among the leſs or more important articles.

Equally inſignificant is the diſtinction propoſed here between the articles of great importance and thoſe of little importance. According to ſtrict juſtice the violation of the leaſt article diſpenſes the offended party from the obſervation of the other, they being all, as we have juſt ſeen, con-

[a] Vide Wolf. Jus Gent. Sect. 1022, 1023. [b] Lib. III. Cap. XIX. Sect. 14.

nected

nected reciprocally as ſo many conditions. Beſides, what a ſource of diſputes is ſuch a diſtinction! who ſhall determine the importance of the article violated? However, always to annul a treaty on the leaſt cauſe of complaint, is by no means agreeable to the mutual duties of nations, to humanity, and to the love of peace, which ſhould always particularly influence their conduct.

§ 49. Of the penalty annexed to the violation of an article.

In order to prevent ſo great an inconveniency, a penalty ſhould be impoſed on the infractor of any article of leſs importance; and then on his diſcharging the penalty, the treaty again ſubſiſts in his whole force. Likewiſe a penalty may be annexed to the violation of every article proportionate to its importance. This matter we have diſcuſſed in the article of truces (Book III. Sect. 243.).

§ 50. Of affected delays.

Affected delays are equivalent to an expreſs denial, and differ from it only in the artifice, with which he who practices them, ſeeks to conceal his deceit: he adds fraud to perfidy, and actually violates the article which he ſhould fulfil.

§ 51. Of inſurmountable impediments.

But if the impediment be real, time muſt be allowed, for there can be no obligation to an impoſſibility; and, for the ſame reaſon, if any inſurmountable obſtacle ſhould render the execution of an article not only impracticable for the preſent, but for ever impoſſible, he who engaged for it is guilty of no fault; and the other party cannot make his inability a reaſon for breaking the treaty, but is to accept of an indemnification if the caſe be of ſuch a nature, and an indemnification be practicable. However, if what ought to be done in virtue of the article in queſtion be of ſuch a nature that the treaty ſeems only to have been made with a view to ſome particular thing, not to any equivalent, the impoſſibility which has happened, unqueſtionably annuls the treaty. Thus it is that a treaty of protection becomes void, on an inability of the protector to make good the protection he promiſed, though it be not from any fault of his that he is become incapable. Thus whatever a ſovereign may

may have promiſed on condition of procuring for him the reſtitution of an important place, if this cannot be obtained, he is diſcharged from all he had promiſed in conſideration of having it reſtored. Such is the invariable rule of the law. But the rigour of the law is not always to be inſiſted on. Peace is ſo eſſential to the welfare of mankind; nations are ſo ſtrictly obliged to cultivate, procure, and on any interruption to reſtore it, that when ſuch obſtacles happen in the execution of a treaty of peace, we are candidly to cloſe with all reaſonable expedients, and rather than break a peace already concluded, and take up arms again, accept of equivalents and indemnifications.

§ 52. Of infractions of the treaty of peace by ſubjects.

We have in an expreſs chapter (Book II. Chap. VI.) examined how, and on what occaſions, the actions of ſubjects may be imputed to the ſovereign and the nation. This muſt be determined, in order to determine how the proceedings of ſubjects may break a treaty of peace: this is an effect they cannot produce unleſs their actions are imputed to the ſovereign. He who is injured by foreign ſubjects does himſelf juſtice by his own power, when he meets with the offenders in his territories, or in a free place: for inſtance, on the open ſea; or, if he pleaſes, he requires juſtice from their ſovereign. If the offenders are rebellious ſubjects there is no room for application to their ſovereign; but on ſeizing them even in a free place, every one does himſelf juſtice. In this manner pirates are treated. And to void all miſunderſtanding, it is agreed, that every private perſon committing hoſtilities without a commiſſion from their ſovereign ſhould meet with the ſame treatment.

§ 53. Or by allies.

The actions of our allies may ſtill leſs be imputed to us than thoſe of our ſubjects. The infractions of a treaty of peace by allies, even by thoſe who have been included in it, or who joined in it as principal contracting parties, can therefore produce a rupture of it only with regard to themſelves, and not at all relative to an ally, who, on his ſide, religiouſly

ligiouſly obſerves his engagements. To him the treaty ſubſiſts in its whole force, provided he does not undertake to ſupport the cauſe of theſe perfidious allies. If he furniſhes them with any ſuccour, which he cannot owe them in an occaſion of this nature, he eſpouſes their quarrel, and becomes an accomplice in their breach of faith. But if he is deſirous of preventing their ruin, he may interpoſe, and by obliging them to make proper reparations, ſave them from an oppreſſion which would recoil on himſelf. The defence of them becomes juſt againſt an implacable enemy who will not ſit down with a juſt ſatisfaction.

§ 54. Right of the offended party againſt him who has violated the treaty.

When the treaty of peace is violated by one of the contractors, the other is at liberty to declare the treaty broken, or allow it to ſubſiſt; for he cannot be bound by a contract of reciprocal engagements towards him who does not regard the ſame contract. But if he chuſes not to come to a rupture, the treaty remains valid and obligatory. It would be abſurd that he who had broke it could pretend that it was annulled by his own perfidiouſneſs: this would indeed be an eaſy way of ſhaking off engagements, and reduce all treaties to vain formalities. If the offended party be willing to let the treaty ſubſiſt, he may remit the infraction committed, or require an indemnification or a juſt ſatisfaction, or diſcharge himſelf from ſuch engagements as correſpond with the article violated, from what he had promiſed in conſideration of what has not been fulfilled. But if he determines on demanding a juſt indemnification, and the party in fault refuſes it, the treaty is then, of conſequence, broke, and the injured contractor has a very juſt cauſe for taking up arms again. And this is generally the caſe, it being ſeldom ſeen that the guilty party will ſo far acknowledge its fault as to condeſcend to make reparation.

CHAP.

CHAP. V.

Of the Right of Embaſſy, or of the Right of ſending or receiving public Miniſters.

§ 55. It is neceſſary that nations may treat and communicate together.

IT is neceſſary that nations ſhould treat with each for the good of their affairs, for avoiding reciprocal damages, and for adjuſting and terminating their differences. And all being under the indiſpenſable obligation of joining and concurring in what tends to the common ſafety, and the opportunity (Prelim. Sect. 13.) of procuring to themſelves the means of accommodating and concluding their differences (Book II. Sect. 323. &c.); and each having a right to every thing its preſervation requires (Book I. Sect. 18.) to whatever can contribute to its perfection without injuring others, (ibid. Sect. 23.) as likewiſe to the means neceſſary to the accompliſhment of its duties: it will follow, that every nation has the right of communicating with others, and is under the reciprocal obligation of conforming to this communication, as much as the ſtate of affairs can permit.

§ 56. This is done by public miniſters.

But nations or ſovereign ſtates do not treat together immediately; and it is very ſeldom that their conductors or their ſovereigns can perſonally confer together for diſcuſſing their affairs. Theſe interviews would be often impracticable: and excluſive of delays, troubles, expence, and ſo many other inconveniences, it is rarely, according to the obſervation of Philip de Commines, that any good effect can be expected from them. The only way for nations and ſovereigns to communicate and adjuſt their intereſt is by means of mandatories, or delegates, commiſſioned with their inſtructions and powers; that is by means of *public miniſters*. This term in its utmoſt extent denotes

denotes every perſon charged with public affairs, but is more particularly underſtood of a perſon acting in ſuch capacity at a foreign court.

At preſent there are ſeveral orders of public miniſters, and in the ſequel we ſhall ſpeak of them; but whatever difference cuſtom has introduced among them, the eſſential character is common to them all. I mean that of *miniſter* or repreſentative of a foreign power, a perſon charged with its affairs and orders; and this quality is ſufficient for the point in queſtion.

§ 57. Every ſovereign ſtate has a right to ſend and receive public miniſters.

Every ſovereign ſtate then has a right to ſend and receive public miniſters; they are the neceſſary inſtruments in affairs which ſovereigns have among themſelves, and to that correſpondence which they have a right of carrying on. In the firſt chapter of this work may be ſeen what we mean by ſovereigns and independent ſtates which conſtitute the great ſociety of nations. Theſe are the powers which belong to the right of embaſſy, and an equal alliance or treaty of protection does not take away this right.

§ 58. An unequal alliance nor the treaty of protection does not take away this right.

An unequal alliance nor even the treaty of protection not being incompatible with ſovereignty (Book I. Sect. 5. and 6.) theſe kinds of treaties do not in themſelves deprive a ſtate of the right of ſending or receiving public miniſters. If the inferior ally or the party protected has not expreſsly renounced the right of entertaining connexions and treating with other powers, it neceſſarily retains that of ſending or receiving miniſters. The like is applicable to ſuch vaſſals and tributaries as are no ſubjects (Book I. Sect. 7. 8.).

§ 59. Of the right of princes and ſtates of the empire in this reſpect.

What is more; this right may even belong to princes or communities though not ſovereigns. For the rights, the aſſemblage of which conſtitutes full ſovereignty are not indiviſible, and if, by the conſtitution of the ſtate, by the conceſſion of the ſovereign, or by reſervations which the ſubjects have made with him, a prince or community is poſſeſſed of any one of the rights uſually peculiar to the ſovereign alone, this prince or community may exerciſe it, and avail himſelf

himſelf of it in all its effects and all its conſequences, natural or neceſſary, unleſs they have been formally excepted. Though the princes and ſtates of the empire hold of the emperor or empire, yet in many reſpects are they ſovereigns, and as the conſtitutions of the empire ſecure the right to them of treating with foreign powers and contracting alliances with them, they inconteſtably have alſo that of ſending and receiving public miniſters. This, when they have been able to carry their claims very high, the emperors ſometimes have diſputed with them, or inſiſted that at leaſt the exerciſe of it ſhould be ſubmitted to their ſupreme authority; pretending that their permiſſion was neceſſary. But ſince the peace of Weſtphalia, and the imperial capitulation, the princes and ſtates of Germany have found means to maintain themſelves in the poſſeſſion of this right, and they have ſecured to themſelves ſo many others, that the empire is now conſidered as a republic of ſovereigns.

§ 60. Of cities having the right of receiving foreign miniſters.

It is the ſame with regard to ſubject cities, which are acknowledged to be ſuch, and yet have a right of receiving miniſters of foreign powers, and of ſending deputies to them: becauſe they have a right of treating with them. On this the whole queſtion depends; for who has a right to the end, has a right to the means. It would be abſurd to acknowledge a right of negotiating and treating, and to conteſt the neceſſary means of doing it. The cities of Switzerland, Neufchatel, and Bienne, having the right of banner, have thereby the right of treating with foreign powers, though theſe cities are under the dominion of a prince. For the right of *banner* or of arms comprehends that of granting ſuccours of troops [a], provided it be not contrary to the prince's ſervice. If theſe cities may grant troops, ſurely they may receive the demand made to them by a foreign prince, and treat of conditions. They may likewiſe depute ſome perſon to him for this purpoſe, or receive his miniſters. And as they have at the ſame time

[a] See the hiſtory of the Helvetic Confederacy, by M. DE WATTEVILLE.

the

the adminiſtration of the police, they can cammand reſpect to ſuch foreign miniſters as come to them. What we ſay of the rights of theſe cities is confirmed by an ancient and conſtant practice. However eminent and extraordinary ſuch rights are, they will not be thought ſtrange, if it be conſidered that theſe very cities were poſſeſſed of great privileges, though at the ſame time their princes themſelves held of the emperor, or of other lords, who were immediate vaſſals of the empire: when they threw off the yoke, and put themſelves in a perfect independency, the conſiderable towns of their territories made their conditions, and inſtead of rendering their ſituation worſe, it was very natural for them to take advantage of junctures for rendering it ſtill more free and happy. Sovereigns cannot now proteſt againſt the conditions on which thoſe towns conſented to follow them, and acknowledge them their ſuperiors.

§ 61. Miniſters of viceroys.

Viceroys and governors in chief of a remote province have frequently a right of ſending and receiving public miniſters; but they act in the name and by the authority of the ſovereign whom they repreſent, and whoſe rights they exerciſe. This intirely depends on the will of their conſtituents. The viceroys of Naples, the governors of Milan, the governors-general of the Netherlands for Spain, were inveſted with this power.

§ 62. Miniſters of the nation or regents during an interregnum.

The right of embaſſy, like all other rights of ſovereignty reſides ſolely in the nation as its principal and primitive ſubject. In the interregnum, the exerciſe of this right returns to the nation, or devolves to thoſe whom the laws have inveſted with the regency of the ſtate. They may ſend miniſters in the ſame manner as the ſovereign uſed to do, and theſe miniſters have the ſame right as thoſe of the ſovereign had. On the vacancy of the throne, the republic of Poland ſends ambaſſadors, and would not ſuffer that they ſhould be treated with leſs regard and conſideration than thoſe ſent when it has a king. Cromwell effectually

tually maintained the ambaſſadors of England in the ſame rank and regard as when they were ſent by the authority of kings.

§ 63. Of him who diſturbs another in the right of embaſſy.

Such being the rights of nations, a ſovereign attempting to hinder another from ſending and receiving public miniſters, does him an injury, and offends againſt the law of nations. It is attacking a nation in one of its moſt valuable rights, and oppoſing what nature herſelf gives to every independent ſociety; it is breaking the bands by which nations are united, and offending them all.

§ 64. Of what is allowable herein in time of war.

But this is to be underſtood only in a time of peace: war introduces other rights. It allows us to cut off from an enemy all his reſources, to hinder him from ſending miniſters to ſolicit aſſiſtance. There are even occaſions when the miniſters of a neutral nation going to an enemy, may be refuſed a paſſage. There is no obligation of ſuffering them to carry to him perhaps ſalutary informations, and to concert meaſures for aſſiſting him. This admits of no doubt, for inſtance, in caſe of a beſieged town. No right can authorize the miniſter of a neutral power, nor any other perſon whatſoever, to go into it without the beſiegers leave; but to prevent offence, good reaſons muſt be given to ſovereigns for this refuſal of letting their miniſters paſs, and with ſuch they are to be ſatisfied, if they are diſpoſed to continue neutral. Paſſage is even ſometimes refuſed to ſuſpected miniſters in critical and dubious junctures, though there be no open war. But this is a delicate proceeding, and if not juſtified by reaſons intirely ſatisfactory, produces an acrimony which eaſily produces a rupture.

§ 65. The miniſter of a friendly power to be received.

As nations are obliged to correſpond together, attend to the propoſals and demands made them, to maintain a free and ſafe way of explaining themſelves and adjuſting the differences; a ſovereign cannot, without very particular reaſons, refuſe admitting and hearing the miniſter of a friendly power, or of one with whom he is at peace.

But

But in caſe there are reaſons for not admitting him into the heart of the country, he may appoint a place on the frontiers, notifying that he will ſend proper perſons for hearing his propoſals, and there the foreign miniſter is to ſtop: it is ſufficient that he is heard.

§ 66. Of reſident miniſters.

The obligation does not go ſo far as to ſuffer at all times perpetual miniſters, who are deſirous of reſiding with a ſovereign, though they have nothing to negociate. It is natural, indeed, and very agreeable to the ſentiments which nations owe to each other, that theſe reſident miniſters, when there is nothing to be feared from their ſtay, ſhould be friendly received: but if there be any ſolid reaſon againſt this, what is for the good of the ſtate ought unqueſtionably to be preferred; and the foreign ſovereign canont take it amiſs if his miniſter who has concluded the affairs of his commiſſion, and has no other affairs to negotiate, be deſired to depart. The cuſtom of keeping every where miniſters continually reſident, is now ſo ſtrongly eſtabliſhed, that the refuſal of a conformity to it would, without very good reaſons, give offence. Theſe reaſons may ariſe from particular conjunctures; but there are alſo common reaſons always ſubſiſting, and ſuch as relate to the conſtitution of a government and the ſtate of a nation. The republics have often very good reaſons of the latter kind, to excuſe themſelves from continually ſuffering foreign miniſters, who corrupt the citizens, in order to gain them over to their maſters, to the great prejudice of the republic, and fomenting of the parties, &c. And ſhould they only diffuſe among a nation, formerly plain, frugal, and virtuous, a taſte for luxury, avidity for money, and the manners of courts, theſe would be more than ſufficient for wiſe and provident rules to diſmiſs them. The Poliſh government is not fond of reſident miniſters among them, as indeed their practices with the members of the Diet have given but too many reaſons for keeping them at a diſtance from it. In the year 1666 a nuncio openly complained before

before the whole diet, that the French embaſſador prolonged his ſtay in Poland without any neceſſity, and that he ought to be looked on as a ſpy: others in 1688, moved for a law to fix the term an embaſſador ſhould be allowed to ſtay in the kingdom[a].

§ 67. How miniſters of an enemy are to be admitted.

The greater the calamities of the war are, the more it is incumbent on nations to preſerve means for putting an end to it. This produces a neceſſity, that even in the midſt of hoſtilities, they may be at liberty reciprocally to ſend miniſters for making overtures of peace, or ſome propoſals for bating the rage of war. The miniſters of an enemy cannot indeed come without permiſſion; accordingly a paſſport or ſafe-conduct as aſked for him, either through the intervention of a common friend, or by one of thoſe meſſengers whom the laws of war protect, and of whom we ſhall ſpeak in the ſequel; I mean a trumpet or drum. It muſt likewiſe be owned, that on ſolid reaſons, the ſafe-conduct may be refuſed, and the miniſter not admitted. But this freedom, which is founded on the care every nation owes to its ſafety, does not hinder but that it may be laid down as a general maxim, that we are not to refuſe admitting and hearing an enemy's miniſter: that is, that war alone, and of itſelf, is not a ſufficient reaſon for refuſing to hear every propoſal coming from an enemy. To warrant ſuch refuſal there muſt be ſome particular and well-grounded reaſon; as for inſtance, a reſonable fear, a fear juſtified by the very conduct of an inſidious enemy, which ſends its miniſters to make propoſals, only with a view of making diviſions among allies, of lulling them aſleep with appearances of peace, and impoſing on them.

§ 68. Whether miniſters may be received from or ſent to an uſurper.

Before I cloſe this chapter it will be proper to examine a queſtion, famous for being often debated, whether foreign nations may receive embaſſadors and other miniſters of an uſurper, and ſend ſuch miniſters to him. Here foreign

[a] Wiquefort's embaſſador, Book I. Sect. 1.

powers,

powers, if the advantage of their affairs invites them to it, follow poſſeſſion: there is no rule more certain, or more agreeable to the law of nations and the independency of them. As foreigners have no right to interfere in the domeſtic concerns of a people, they are not obliged to canvaſs and inſpect its œconomy in thoſe particulars, or to weigh either the juſtice or injuſtice of them. They may, if they think proper, ſuppoſe the right to be annexed to the poſſeſſion. When a nation has expelled its ſovereign, the other powers which are not willing to declare againſt it, and would not draw on themſelves its arms or enmity, conſider that nation as a free and ſovereign ſtate, without taking on themſelves to determine whether it has acted juſtly in withdrawing from the allegiance of ſubjects and dethroning the prince. Cardinal Mazarine received Lockhart, who had been ſent as embaſſador from the republic of England, and would neither ſee king Charles the Second, nor his miniſters. If a nation, after driving out its prince, ſubmits to another, or changes the order of ſucceſſion, and acknowledges a ſovereign to the prejudice of the natural and appointed heir; foreign powers may here likewiſe conſider what has been done as legal: it is no quarrel or buſineſs of theirs. At the beginning of the laſt century, Charles Duke of Sudermania having obtained the crown of Sweden, to the prejudice of Sigiſmund King of Poland his nephew, was ſoon acknowledged by moſt ſovereigns. *Villeroy* miniſter of Henry the IVth King of France, at that court, in a memoir of the 8th of April 1608, plainly ſaid to the preſident Jeannin, *All theſe reaſons and conſiderations ſhall not hinder the king from treating with Charles, if he finds it to be his intereſt, and that of his kingdom.*

This was arguing ſenſibly. The King of France was neither the judge nor the guardian of the Swediſh nation, that he ſhould, againſt the good of his own kingdom, refuſe to acknowledge the King which Sweden had choſen, under

under pretence that a competitor termed Charles an uſurper. Had it even been done with juſtice, it does not come under the cognizance of foreigners.

Therefore, when foreign powers have received the miniſters of an uſurper, and ſent theirs to him, the lawful prince, on recovering his throne, cannot complain of theſe meaſures as an injury, nor juſtly make them the cauſe of a war, provided theſe powers have not gone farther, nor furniſhed any ſuccours againſt him. But to acknowledge the prince dethroned, or his heir, after a ſolemn acknowledgment of him who fills his place, is doing wrong to the latter, and declaring againſt the nation who has choſen him. Such a ſtep which had been taken in favour of James the IId's ſon, King William the IIId, and the Engliſh nation alledged, as one of the principal reaſons of the war which England ſoon after declared againſt France. All the blandiſhments and all the proteſtations of Lewis XIV. were of no weight: the Engliſh accounted the acknowledgement of James's ſon as King of England, Scotland, and Ireland, by the title of James the IIId, an outrage and injuſtice both to the king and the nation.

CHAP.

CHAP VI.

Of the ſeveral Orders of public Miniſters, of the repreſentative Character, and of the Honours due to Miniſters.

§ 69. Origin of the ſeveral orders of public miniſters.

ANTIENTLY ſcarce any other than one order of public miniſters was heard of; theſe were in Latin termed *Legati*, which has been rendered by the word ambaſſador, but courts becoming more proud, and conſequently more difficult on the ceremonial part, eſpecially it was thought neceſſary to extend the repreſentation of the miniſter to the dignity of his maſter; and for avoiding difficulties, perplexities, and expence, commiſſioners of a leſs exalted rank came to be employed on certain occaſions (perhaps of this the firſt example was ſet by Lewis XI. king of France.) Thus ſeveral orders of miniſters being eſtabliſhed, more or leſs dignity was annexed to their character, and proportionate honours were required for them.

§ 70. Of the repreſentative character.

Every miniſter in ſome meaſure repreſents his maſter, as every attorney or mandatoty repreſents his conſtituent, but this repreſentation relates to the affairs of his office; the miniſter repreſents the ſubject in whom reſide the rights which he is to exerciſe, preſerve, and aſſert, the rights which he is to treat of in the maſter's ſtead. In the generality, and for the eſſential part of affairs, ſuch repreſentation is admitted as an abſtract from the dignity of the conſtituent. Afterwards ſovereigns would be repreſented not only in their rights and to ſettle their affairs, but likewiſe in their dignity, their grandeur, and pre-eminence; unqueſtionably this cuſtom was derived from ſome ſignal occaſions, and ceremonies, as marriages, for which ambaſſadors are ſent. But ſuch ſublime degree of dignity in the miniſter is very inconvenient to buſineſs, often occaſioning difficulties and conteſts. This has introduced the ſeveral ranks of public miniſters, and the different degrees of repre-

ſentation. Cuſtom has eſtabliſhed three principal degrees. *The repreſentative Character*, ſo called by way of excellence, is the power reſident in the miniſter of repreſenting his maſter even in his very perſon and dignity.

§ 71. Of ambaſſadors. The repreſentative character, ſo termed by way of excellence, or in diſtinction from other kinds of repreſentations, conſtitutes the miniſter of the firſt rank, the ambaſſador. It places him above all other miniſters, who are not inveſted with the ſame character, and precludes their entering into competition with the ambaſſador. At preſent there are ambaſſadors ordinary and extraordinary; but this is no more than an accidental diſtinction, and relative to the ſubject of their miſſion. Yet almoſt every-where ſome difference is made in the treatment of theſe different ambaſſadors. This is merely matter of cuſtom.

§ 72. Of envoys. *Envoys* are not inveſted with the repreſentative character, properly ſo called, or in the firſt degree. They are miniſters of the ſecond rank, on whom their maſter was willing to confer a degree of dignity and regard, which without being on a level with the character of an ambaſſador, immediately follows it, as ſuperior to every other. There are alſo *Envoys ordinary and extraordinary*, and the intention of princes manifeſtly is, that the latter be moſt regarded. This likewiſe depends on cuſtom.

§ 73. Of reſidents. The word *Reſident* formerly only related to the continuance of the miniſter's ſtay, and it is frequent in hiſtory for ambaſſadors in ordinary to be ſtiled only reſidents. But ſince the eſtabliſhment of different orders of miniſters, the name of reſident has been limited to miniſters of a third order, to the character of which general practice has annexed a leſſer degree of regard. The reſident does not repreſent the prince's perſon in his dignity, but only in his affairs. His repreſentation is in reality of the ſame nature as that of the envoy: and he is accordingly, together with the envoy, often termed a miniſter of the ſecond order; and the public miniſters are diſtinguiſhed only into two claſſes: ambaſſadors

ſadors who have the repreſentative character, ſo termed by way of excellence, and all the miniſters who are not inveſted with that eminent character. This is the moſt neceſſary diſtinction, and indeed the only eſſential.

§ 47. Of miniſters.

Laſtly, a cuſtom ſtill more modern, has erected a new kind of miniſters without any particular determination of character. Theſe are called ſimply miniſters, to indicate that they are inveſted with the general quality of a ſovereign's mandatories, without any particular aſſignment of rank and character. It was likewiſe the punctilio of ceremony which gave riſe to this novelty. Uſe had eſtabliſhed diſtinct treatment for an ambaſſador, an envoy, and a reſident. Difficulties betwixt miniſters of the ſeveral princes often aroſe on this head, and eſpecially about rank. In order to avoid all conteſt on certain critical occaſions, when they might be apprehended, it has been judged proper to ſend miniſters, without giving them any of theſe known characters; ſuch are not ſubjected to any ſettled ceremony, and can pretend to no particular treatment. The miniſter repreſents his maſter in a vague and indeterminate manner, which cannot be equal to the firſt degree, and conſequently makes no difficulty of yielding to an ambaſſador. He is intitled to the general regard due to a perſon of confidence, to whom the ſovereign commits the care of his affairs, and he has all the rights eſſential to the character of a public miniſter. This indeterminate quality is ſuch that the ſovereign may give it to one of his ſervants on whom he would not confer the character of ambaſſador: and, on the other hand, it may be accepted by a man of rank, who would not ſubmit to the rank of reſident, and acquieſce in the treatment at preſent allotted to that ſtation. There are alſo *miniſters plenipotentiaries*, and of much greater diſtinction than ſimple miniſters. Theſe neither have any particular attribution of rank and character, but by cuſtom are now placed immediately after the ambaſſador, or on a level with the envoy extraordinary.

§ 75. Of conſuls, agents, deputies, &c.

We have ſpoken of *conſuls* in the article of commerce (Book II. Sect. 34.). Formerly *agents* were a kind of public miniſters; but in the preſent increaſe and pofuſion of titles, this is given to mere commiſſioners appointed by princes for their private affairs, and who not unfrequently are ſubjects of the country where they reſide. They are not public miniſters, and conſequently not under the protection of the law of nations. But a more particular protection is due to them than to other foreigners or citizens, and ſome regard in conſideration of the prince whom they ſerve. If this prince ſends an agent with credentials, and for public affairs, the agent from that time becomes a public miniſter: the title makes no alteration. This is likewiſe applicable to deputies, commiſſaries, and others charged with public affairs.

§ 76. Of credentials.

Among the ſeveral characters eſtabliſhed by cuſtom, it is in the ſovereign's choice with which he will inveſt his miniſter; and the character of the miniſter is made known in the credentials which he delivers to the ſovereign to whom he is ſent. Letters of credence are the inſtrument which authorizes and eſtabliſhes the miniſter in his character with the prince to whom they are addreſſed. If this prince receives the miniſter, he can receive him only in the quality attributed to him in his credentials. They are as it were his general letter of attorney, his *mandate patent, mandatum manifeſtum.*

§ 77. Of inſtructions.

The inſtructions given to the miniſter contain the maſter's *ſecret mandate*, the orders to which the miniſter muſt carefully conform, and which limit his powers. Here might be implied all the rules of the law of nature concerning the ſubject of the mandate, whether patent or ſecret. But as this more particularly concerns the ſubject of treaties, we may the more properly exclude ſuch details from this work, as by a very well-grounded cuſtom any engagements which the miniſter ſhould enter into, are at preſent of no force among ſovereigns, unleſs ratified by his principal.

We

§ 78. Of the right of ſending ambaſſadors.

We have ſeen above that every ſovereign, and even every body-politic, or every perſon who has a right to treat with foreign powers, may alſo ſend ambaſſadors: See the foregoing chapter. As to ſimple miniſters or mandatories conſidered in general as charged with affairs, and furniſhed with powers from thoſe who have a right of treating, this admits of no difficulty. The rights and perogatives of miniſters of the ſecond order are ſtill granted to miniſters of any ſovereign ſtate; potent monarchs indeed deny ſome petty ſtates the right of ſending ambaſſadors; but let us ſee with what reaſon. According to the uſage generally received, the ambaſſador is a public miniſter repreſenting the perſon and dignity of a ſovereign; and this repreſentative character procures him particular honours. Great princes make a difficulty of admitting an ambaſſador of a ſmall ſtate, from a repugnancy of paying him ſuch diſtinguiſhed honours. But it is manifeſt that every ſovereign has an equal right of cauſing himſelf to be repreſented, no leſs in the firſt, than in the ſecond or third degree. Beſides, in the ſociety of nations a diſtinguiſhed conſideration is due to the ſovereign dignity. We have ſhewn (Book II. Ch. III.) that the dignity of independent nations is eſſentially the ſame; that a ſovereign prince, though weak, is a ſovereign independent, and equal to the greateſt monarch, as a dwarf is not leſs a man than a giant, though indeed the political giant makes a greater figure in the general ſociety than the dwarf, and on this account more reſpect and ſignal honours are paid to him. It is evident then that every prince and every ſtate has a right of ſending ambaſſadors, and that to oppoſe it in ſuch right is a very great injury; it is conteſting its ſovereign dignity. And if it has this right, its ambaſſadors cannot be denied thoſe regards and honours which cuſtom particularly aſſigns to the repreſentative of a ſovereign. The King of France receives no ambaſſadors from the Princes of Germany, as refuſing to their miniſters the honours annexed to the firſt degree of

of repreſentation; yet he admits ambaſſadors from the princes of Italy. The reaſon pretended for this is, that the latter are more perfectly ſovereigns than the former, as not holding in a like manner from the authority of the emperor or the empire, though feudatories of it. Yet the emperors claim the ſame rights over the princes of Italy, as over thoſe of Germany. But France ſeeing that the former do not make one body with Germany, nor aſſiſt at the diets, countenances their abſolute independence, in order as much as poſſible to detach them from the empire.

§ 79. Of the honors due to ambaſſadors.

I ſhall not here enter into a detail of the honours due and actually paid to ambaſſadors: theſe depend merely on inſtitution and cuſtom: I ſhall only obſerve, in general, that they are intitled to thoſe civilities and diſtinctions which uſe and good manners have appointed, as expreſſions of the conſideration ſuitable to the repreſentative of a ſovereign. And it muſt be obſerved here, with regard to things of inſtitution and cuſtom, that when a practice is ſo ſettled as to give a real value to things indifferent in their nature, and a fixed ſignification according to the manners and uſages, the natural and neceſſaty law of nations neceſſarily requires that regard ſhould be had to ſuch inſtitution; and to behave in ſuch things as if they had in themſelves the value which has been annexed to them. For inſtance, according to the uſage throughout Europe, it is a peculiar right for the ambaſſador to wear his hat before the prince to whom he is ſent. This right expreſſes that he is acknowledged the repreſentative of a ſovereign; to refuſe it therefore to the ambaſſador of a ſtate truly independent, would be an injury to the ſtate, and in ſome meaſure degrading it. The Switzers, who formerly underſtood war better than the uſages or forms of courts, and little mindful of what was mere ceremony, having on ſome occaſions permitted themſelves to be treated in a manner little ſuitable to the dignity of the nation; their ambaſſadors, in 1663, ſuffered the King of France, and the nobles of his court,

to

to refuſe them thoſe honours which cuſtom has rendered eſſential to the ambaſſadors of ſovereigns, and particularly that of being covered before the king at their audience.

Some who knew better what they owed to the glory of their republic ſtrongly inſiſted on this eſſential and diſtinctive honour, but it was carried by a majority, and, at length, all yielded, on being aſſured that the ambaſſador of the nation had not covered himſelf before Henry the IVth. Allowing the fact to be true, the reaſon was not unanſwerable. The Switzers might reply, that in Henry's time their nation was ſolemnly acknowledged free and independent of the empire, as in 1648, by the treaty of Weſtphalia. They might have ſaid, that though their predeceſſors had been wanting in a proper ſupport of the dignity of their ſovereigns, that groſs over-ſight was no obligation on their ſucceſſors to commit the like. At preſent, as the nation knows better, and is more attentive to thoſe kind of things, it will not fail to maintain its dignity. Any other extraordinary honours paid to its ambaſſadors will not be able to blind it ſo far as to overlook that which cuſtom has rendered eſſential. When Lewis XV. came into Alſatia in 1744, the Helvetick body declined ſending ambaſſadors to compliment him according to cuſtom, without knowing whether their ambaſſadors would be allowed to wear their hats: and on the refuſal of this juſt demand, none were ſent. Switzerland may reaſonably hope that his moſt Chriſtian majeſty will no longer inſiſt on a claim which does not heighten the luſtre of his crown, but degrades antient and faithful allies.

CHAP.

CHAP. VII.

Of the Rights, Privileges, and Immunities of Ambaſſadors and other Public Miniſters.

§ 80. Reſpect due to public miniſters.

A RESPECT due to ſovereigns ſhould reflect on their repreſentatives, and chiefly on their ambaſſadors, as repreſenting his maſter's perſon in the firſt degree. Whoever affronts or injures a public miniſter commits a crime the more deſerving a ſevere puniſhment, as thereby the ſovereign and his country might be brought into great difficulties and trouble. It is juſt that he ſhould be puniſhed for his fault, and that the ſtate ſhould, at the expence of the delinquent, give a full ſatisfaction to the ſovereign affronted in the perſon of his miniſter. If a ſovereign miniſter offends a citizen, the latter may oppoſe him without departing from the reſpect due to the character, and give him a leſſon which ſhall both efface the ſtain of the outrage and expoſe the author of it. The perſon offended may further prefer a complaint to his ſovereign, who will demand of the miniſter's maſter a juſt ſatisfaction. The great concerns of the ſtate forbid a citizen on ſuch occaſions, to entertain thoſe thoughts of revenge, which the point of honour might ſuggeſt, though otherwiſe allowable. Even, according to the maxims of the world, a gentleman receives no diſgrace by an affront for which it is not in his power, of himſelf, to procure ſatisfaction.

§ 81. Their perſon ſacred and inviolable.

The neceſſity and right of embaſſies being eſtabliſhed (See Chap. V. of this Book) the perfect ſecurity, the inviolability of ambaſſadors and other miniſters, is a certain conſequence of it; for if their perſon be not defended from violence of every kind, the right of embaſſies becomes precarious, and the ſucceſs very uncertain. A right to the end

end is a right to the neceſſary means. Embaſſies then being of ſuch great importance in the univerſal ſociety of nations, and ſo neceſſary to their common well-being, the perſon of miniſters charged with this embaſſy is to be *ſacred* and *inviolable* among all nations (See Book. II. Sect. 218.). Whoever offers any violence to an ambaſſador, or any other public miniſter, not only injures the ſovereign whom this miniſter repreſents, but he alſo hurts the common ſafety and well-being of nations: he becomes guilty of an atrocious crime towards the whole world.

§ 82. Particular protection due to them.

This ſafety is particularly due to the miniſter, from the ſovereign to whom he is ſent. To admit a miniſter, to acknowledge him in ſuch quality, is engaging to grant him the moſt particular protection, and that he ſhall enjoy all poſſible ſafety. A ſovereign is indeed to protect every perſon within his dominions, whether native or foreigner, and ſhelter him from violence, but this attention is in a higher degree due to a foreign miniſter. A violence done to a private perſon is a common treſpaſs, which, according to circumſtances, the prince may pardon: but if done to a public miniſter, it is a crime of ſtate, an offence againſt the law of nations. A pardon of this does not depend on the prince, in whoſe country the crime has been committed, but on him who has been offended in the perſon of his repreſentative. However, if the miniſter has been inſuled by perſons ignorant of his character, the fault does not affect the law of nations; but comes within the caſe of common treſpaſſes. Some diſſolute young fellows in a town of Switzerland having, in the night time, inſulted the Engliſh miniſter's houſe, not knowing who lived there, the magiſtracy ſent a meſſage to the miniſter to know what ſatisfaction he required. He wiſely anſwered, that it was the magiſtrates concern to vindicate the public as they ſhould judge proper, but as for himſelf he required nothing, not thinking himſelf affronted by perſons who could have no deſign on him, as not knowing his houſe. Another particular

CHAP. VII.

Of the Rights, Privileges, and Immunities of Ambaſſadors and other Public Miniſters.

§ 80. Reſpect due to public miniſters.

A RESPECT due to ſovereigns ſhould reflect on their repreſentatives, and chiefly on their ambaſſadors, as repreſenting his maſter's perſon in the firſt degree. Whoever affronts or injures a public miniſter commits a crime the more deſerving a ſevere puniſhment, as thereby the ſovereign and his country might be brought into great difficulties and trouble. It is juſt that he ſhould be puniſhed for his fault, and that the ſtate ſhould, at the expence of the delinquent, give a full ſatisfaction to the ſovereign affronted in the perſon of his miniſter. If a ſovereign miniſter offends a citizen, the latter may oppoſe him without departing from the reſpect due to the character, and give him a leſſon which ſhall both efface the ſtain of the outrage and expoſe the author of it. The perſon offended may further prefer a complaint to his ſovereign, who will demand of the miniſter's maſter a juſt ſatisfaction. The great concerns of the ſtate forbid a citizen on ſuch occaſions, to entertain thoſe thoughts of revenge, which the point of honour might ſuggeſt, though otherwiſe allowable. Even, according to the maxims of the world, a gentleman receives no diſgrace by an affront for which it is not in his power, of himſelf, to procure ſatisfaction.

§ 81. Their perſon ſacred and inviolable.

The neceſſity and right of embaſſies being eſtabliſhed (See Chap. V. of this Book) the perfect ſecurity, the inviolability of ambaſſadors and other miniſters, is a certain conſequence of it; for if their perſon be not defended from violence of every kind, the right of embaſſies becomes precarious, and the ſucceſs very uncertain. A right to the

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particular circumſtance in the protection of foreign miniſters is this: According to the wretched maxims introduced by a falſe point of honour, a ſovereign is under a neceſſity of ſhewing indulgence towards a perſon wearing a ſword, who inſtantly revenges an affront done to him by a private perſon; but violent proceedings can never be allowed of, or excuſed againſt a public miniſter, unleſs the latter by beginning and urging the violence, ſhould lay the other under a neceſſity of defending himſelf.

§ 83. Of the time when it commences.

Though the miniſter's character does not become declared in its whole extent, and thus does not ſecure to him the enjoyment of all his rights till he is acknowledged and admitted by the ſovereign to whom he delivers his credentials; yet, on his entering into the country whither he is ſent, and making himſelf known, he is under the protection of the law of nations; otherwiſe it would not be ſafe for him to come. Till he has had his audience of the prince, he is on his word to be conſidered as a miniſter; and farther, beſides notice of it, uſually ſent by letters in caſe of doubt, the miniſter is provided with paſſports, certifying his character.

§ 84. What is due to them in countries thro' which they paſs.

Theſe paſſports ſometimes become neceſſary to him in the countries through which he paſſes in his way to the place of his deſtination; and, when it is neceſſary for procuring the reſpect and honour due to him, he produces them. Indeed that prince alone to whom the miniſter is ſent, is under a particular obligation that he ſhall enjoy all the rights annexed to his character: yet the others through whoſe dominions he paſſes, are not to deny him thoſe regards to which the miniſter of a ſoverign is intitled, and which nations reciprocally owe to each other. They eſpecially owe him an intire ſafety. To inſult him would be injuring his maſter, and the whole nation; to arreſt him and offer violence to him, would be hurting the right of embaſſy, which belongs to all ſovereigns (Sect. 57. 63.) Francis the firſt King of France had all the reaſon in the world

world to complain of the murder of his ambaſſadors Rincon and Fregoſa, as an horrible crime againſt public faith and the law of nations. Theſe two perſons deſtined the one to Conſtantinople, and the other to Venice, having embarked on the Po, were ſtopt and murdered, and in appearance by order of the governor of Milan[a]. The emperor Charles the Vth's negligence to diſover the author of the murder gave room to think that he had ordered it, or at leaſt that he had tacitly approved of the fact. And as he did not give any ſuitable ſatisfaction concerning it, Francis the Iſt had a very juſt cauſe for declaring war againſt him, and even demanding aſſiſtance of all other nations. For an affair of this nature is not a particular difference, or a litigious queſtion, in which each party wreſts law over to its ſide; it is the quarrel of all nations who are concerned to maintain as ſacred the right and means of communicating together, and treating of their affairs. If an innocent paſſage be due, even with intire ſafety, to a mere private perſon, much more is it due to the miniſter of a ſovereign who is going to execute his maſter's orders, and travels on the affairs of a nation. I ſay, an innocent paſſage, for the miniſters journey is juſtly ſuſpected, if a ſovereign has reaſon to apprehend that he will abuſe the freedom of coming into his country, for plotting ſomething againſt his ſervice, or that he is going to give intelligence to his enemies, or to ſtir up others againſt him. We have already ſaid (Sect. 64.) that a paſſage may be denied him; but he is not to male-treat him, nor ſuffer any inſult to be offered to his perſon. Though he has not reaſon ſufficient for denying him a paſſage, he may take precautions againſt the ample uſe which the miniſter may make of it. Theſe maxims the Spaniards found even in Mexico, and the neighbouring countries. The ambaſſadors were reſpected all along the road, but if they went out of the highway

[a] Memoirs of Martin du Bellay, Book IX.

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they were to forfeit their rights [b]. A very wise reservation, that spies might not be sent under the name of ambassadors. Thus, at the famous congress of Westphalia, whilst peace was negociating amidst the dangers of war and the noise of arms, the routs of the several couriers sent or received by the plenipotentiaries were marked, and out of such limits their passports were of no protection [c].

§ 85. Ambassadors going into an enemy's country.

What we have said concerns nations which are at peace with each otherr On the breaking out of a war, the obligation of leaving the enemy in the free enjoyment of his right ceases; and, on the other hand, we are warranted in depriving him, weakening him, and reducing him to accept of equitable conditions. His men may also be attacked and seized wherever there is a right of exercising acts of hostility. Thus a passage may not only be refused to the ministers of an enemy sent to other sovereigns, but if they undertake to pass privately, and without permission, into places belonging to their master's enemy, they are liable to be arrested; and of this the last war furnishes a signal instance. An ambassador of France going to Berlin, by the imprudence of his guides, took his way through a village within the electorate of Hanover, of which the sovereign, the King of England, was at war with France: he was arrested, and afterwards sent over to England. As his Britannic majesty had herein only made use of the rights of war, neither the court of France nor that of Prussia complained about it.

§ 86. Embassies betwixt enemies.

The reasons which render embassies necessary, and ambassadors sacred and inviolable, are of no less force in time of war than in a profound peace. On the contrary the necessity and indispensable duty of retaining some method of reconciliation and the restoration of peace, is a fresh reason why the persons of ministers, as instruments of the reconciliatory conferences, should be still more sacred

[b] Solis's history of the conquest of Mexico.
[c] Wicquefort's ambassador. Book I. Sec. 17.

and

and inviolable. *Nomen legati*, says Cicero. *ejusmodi esse debet, quod non modo inter sociorum jura, sed etiam inter hostium tela incolume versetur* [b]. Accordingly the safety of persons bringing messages or proposals from the enemy, is one of the most sacred laws of war Indeed the ambassador of an enemy is not to come without permission, and as there is not always the conveniency of procuring it by neutral persons, this has been supplied by the establishment of certain privileged messengers for carrying proposals from enemy to enemy, in perfect safety.

§ 87. Of heralds, trumpeters, and drummers.

I mean heralds, trumpeters and drummers, who by the laws of war, and those of nations, are, on their making themselves known, and keeping within the terms of their commission, and the functions of their employment, sacred and inviolable. This must necessarily be, for exclusive of what we have said concerning the reservation for restoring peace, there are in the very course of war, a thousand occasions, when the common safety and the advantage of both parties require that they should be able to send messages and proposals. Heralds succeeded the *Feciales* of the Romans: At present they are grown out of use, drummers or trumpeters are sent, and afterwards, according to the occasions, ministers or officers furnished with powers. These drummers and trumpeters are sacred and inviolable, but they are to make themselves known by the marks peculiar to them. Maurice Prince of Orange highly resented the garrison of Ysendick firing on his trumpeter [c]; saying that they who violate the law of nations cannot be too severely punished. Other instances may be seen in Wicquefort, and particularly the reparation which the Duke of Savoy, as general of Charles the Vth's army, caused to be made to a French trumpeter, who had been pulled off his horse and stripped by some German soldiers [f].

[b] In Verrem. Lib. I. [c] Wicquefort, Book I. Sect. III. [f] Ibid.

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§ 88. Ministers, trumpeters, &c. to be respected even in a civil war.

In the wars of the Netherlands the Duke of Alva hanged up a trumpeter belonging to the Prince of Orange, saying, that he was not obliged to allow safety to a trumpeter sent him by the chief of the rebels [g]. Certainly this sanguinary general, on this occasion as on many others, violated the laws of war, which, as we have proved above (Book III. Chap. XVIII.) are to be observed even in civil wars. And unless both parties can, with the greatest safety, interchange messages, and reciprocally send persons of confidence, how, on these unfortunate occasions, will they ever come to talk of peace? what way is left for negociating a salutary accommodation? The same Duke of Alva, in the war which the Spaniards afterwards made on the Portuguese, whom they also termed rebels, caused the governor of Cascais to be hanged, for firing on a trumpeter sent to summon the place [h]. In a civil war, or when a prince takes arms for subduing a people which believes itself discharged from their obedience to him, to pretend that the enemies should respect the laws of war, whilst he himself treats them in a quite contrary manner, is carrying wars to the most cruel extremes, and forming a series of mutual reprisals; it is turning them into massacres without rule or measure.

§ 89. Something they may be denied admittance.

But as a prince may, on good reasons, dispense with himself from hearing and admitting ambassadors, the general of an army, or any other commander, is not always obliged to receive a trumpeter or drummer: for instance, if the governor of a place apprehends that a summons may intimidate his garrison, and raise thoughts of capitulating sooner than is proper, he may unquestionably send notice to a trumpeter who is coming up, that he should withdraw, and likewise declare that if he returns on the same cause, and without leave, he shall be fired on. This conduct is not a violation of the laws of war, but is to be practised only for very cogent reasons; as it irritates the enemy and

[g] Idem. Ibid. [h] Idem. Ibid.

exposes

expoſes us to be treated by them with the greateſt rigour. To refuſe hearing a trumpet without alleging a good reaſon, is declaring a determined intention of carrying on the war to the utmoſt extremity.

§ 90. Every thing which has the appearance of inſult muſt be avoided.

Whether a herald or a trumpeter be admitted or rejected, any thing which may be conſtrued an inſult is to be avoided towards him. This is a reſpect not only due to the law of nations, but likewiſe a prudential maxim. In 1744, the Bailly de Givry ſent a trumpeter with an officer to ſummon the redoubt of Pierrelonge in Piedmont. The Savoyard officer who commanded in the redoubt, a brave man, but rough and hot, affronted at being ſummoned in a poſt which he thought tenable and ſecure, returned an anſwer reflecting on the French general. The officer, like a man of ſenſe, delivered it to the Bailly de Givry in the preſence of the French troops. It ſet them in a flame, and their natural courage being ſtimulated by the ardour of revenging an affront, they were not to be ſtopped; the attack proved very bloody; but their loſſes animated them the more, till at length they carried the redoubt: and thus the imprudent commandant was acceſſary to his own death, the ſlaughter of his men, and the loſs of his poſt.

§ 91. By and to whom they may be ſent.

The prince, the general of the army, and every commander in chief within his department, have alone the right of ſending a trumpeter or drummer; and it is only to the commander in chief that ſuch meſſengers can be ſent. Should a general, beſieging a town, take upon him to ſend a trumpeter to any ſubaltern, to the magiſtracy, or the townſmen, the governor might juſtly treat this trumpeter as a ſpy. Francis Iſt King of France, during the war with Charles the Vth, ſent a trumpeter to the diet of the empire, then aſſembled at Spires. The trumpeter was ſeized by order of the emperor, who threatened to hang him becauſe he was not ſent to him[1]. But this was more than

[1] Wicquefort, ubi ſupra.

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he dared, known very well, notwithſtanding all his clamours, that the diet having a right, even without his conſent, to hear an enemy's overtures, that enemy might ſend a trumpet to it. On the other hand, a drummer or trumpeter from a ſubaltern is ſeldom received, unleſs for ſome particular end, depending on the preſent authority of this ſubaltern acting in his function. At the ſiege of Rhymberg in 1598, a colonel of a Spaniſh regiment having forgot himſelf ſo far as to cauſe the place to be ſummoned, the governor ſent word to the drummer to withdraw, and that ſhould any other drummer or trumpeter come again from a ſubaltern, a halter ſhould be his portion.[k]

§ 92. Independence of foreign miniſters.

The inviolability of a public miniſter, or the ſafety due to him more ſacredly and more particularly than any other perſon, whether foreigner or native, is not his only privilege; he is further, by the univerſal practice of nations, to enjoy an intire independency from the juriſdiction and authority of the ſtate where he reſides. Some authors[l] pretened that this independency is merely poſitive among nations, and will have it referred to the arbitrary law of nations, which owes its origin to the manners, the cuſtoms, or particular conventions: they deny it to be grounded on the natural law of nations. Indeed the law of nature gives men a right of puniſhing thoſe who do them wrong; and conſequently impowers a ſovereign to puniſh a foreigner who diſturbs the public tranquillity, offends themſelves, or maletreats their ſubjects: it authorizes them to compel this foreigner to conform himſelf to the laws, and to behave properly towards the citizens. But it is no leſs true, that the ſame natural law impoſes on all ſovereigns the obligation of conſenting to thoſe things without which nations could not cultivate the ſociety nature has eſtabliſhed among them, correſpond together, negociate their affairs, or adjuſt their differences. Now am-

[k] Idem. Ibid. [l] Vide. Wolf. Jus Gent. Sect. 1059.

baſſadors

baſſadors and other public miniſters are inſtruments neceſſary to the ſupport of this general ſociety, of this mutual correſpondence of nations. But their miniſtry cannot attain its deſigned end, unleſs inveſted with all the prerogatives which may ſecure the lawful ſucceſs of it; and which are neceſſary for the free, faithful, and ſafe diſcharge of it. The ſame law of nations whereby they are obliged to admit foreign miniſters, manifeſtly obliges them likewiſe to admit thoſe miniſters, with all the rights neceſſary to them, and all the privileges relative to the exerciſe of their functions. It is eaſy to conceive that independency muſt be one of theſe privileges, without it that privilege ſo neceſſary to a public miniſter would be precarious and fluctuating. He might be moleſted, injured, maletreated, under a thouſand pretences. A miniſter is often charged with a commiſſion diſagreeable to the prince to whom he is ſent. If this prince has any power over him, and eſpecially if his authority be ſovereign, how is it to be expected that the miniſter can execute his maſter's orders with a proper freedom of mind, fidelity, and firmneſs. It is neceſſary he ſhould have no ſnares to fear, that he cannot be diverted from his functions by any chicanery. He muſt have nothing to hope, and nothing to fear, from the ſovereign to whom he is ſent. Therefore, in order to the ſucceſs of his miniſtry, he muſt be independent of the ſovereign's authority, and of the juriſdiction of the country both civil and criminal. To this it may be added, that the nobility and perſons of great eminence, will be averſe from taking on themſelves an embaſſy, if by this commiſſion they were to be ſubjected to a foreign authority, and often among nations of no very friendly diſpoſitions to that which they repreſent; where they muſt ſupport diſagreeable claims, and enter into diſcuſſions naturally productive of acrimony. In fine, if an ambaſſador could be indicted for common treſpaſſes, be criminally proſecuted, taken into cuſtody, puniſhed; if he might be ſued in civil caſes, the conſequence will often be, that he will want the

power, leiſure, or freedom of mind which his maſter's affairs require. How will the dignity of the repreſentation be ſupported in ſuch a ſubjection? From all theſe reaſons it is impoſſible to conceive, that the prince, in ſending an ambaſſador, or any other miniſter, intends to ſubmit him to the authority of a foreign power. This is a freſh reaſon, which fixes the independency of a publick miniſter. If it cannot be reaſonably preſumed, that his maſter means to ſubmit him to the authority of the ſovereign to whom he is ſent; this ſovereign, in receiving the miniſter, conſents to admit him on the footing of independency. And thus there ſubſiſts betwixt the two princes a paſſive convention, giving a new force to the natural obligation.

Practice is entirely conſentaneous to our principles. All ſovereigns claim a perfect independency for their ambaſſadors and miniſters. If it be true that there was a king of Spain who, from a deſire of arrogating to himſelf a juriſdiction over the foreign miniſters reſident at his court, ſignified to all chriſtian princes, that if their ambaſſadors ſhould commit any crime in the place of their reſidence, it was his pleaſure that they ſhould forfeit all their privileges, and be tried according to the laws of the country (*a*); one example is of no weight in ſuch a point, and the crown of Spain has not thought fit to adopt that way of thinking.

§ 93. How the foreign miniſter is to behave.

This independency of the foreign miniſter is not to be converted into licentiouſneſs; it does not excuſe him from conforming in external actions in every thing foreign from the end of his character to the cuſtoms and laws of the country: he is independent, but he has not a right of doing whatever he pleaſes. Thus, for inſtance, if it be generally prohibited to drive a coach near a powder magazine, or over a bridge, to walk among the fortifications of the place, and view them, &c. Theſe prohibitions an am-

(*a*) This is advanced by Antony de Vera, in his *Complete Ambaſſador*, but Wicquefort ſuſpects the truth of it, not having, as he ſays, met with it in any other writer.

baſſador

baſſador is to regard; ſhould he forget his duty, ſhould he grow inſolent and commit irregularities and crimes, there are ſeveral ways of reſtraining him, according to the nature and importance of his offences, and theſe we ſhall ſpeak of after a few words on the behaviour of a public miniſter in the place of his reſidence. He is not to avail himſelf of his independency for violating the laws and cuſtoms, he ſhould rather punctually conform to them as far as may concern him, though the magiſtrate has no compulſive power over him; and he is eſpecially obliged religiouſly to obſerve the rules of juſtice towards all who have any dealings with him. As to the prince to whom he is ſent, the ambaſſador ſhould remember, that his miniſtry is a miniſtry of peace, and that on this footing only he is received. This reaſon interdicts every evil practice to him. Let him ſerve his maſter without injuring the prince who receives him. To abuſe a ſacred character by ſecurely plotting the ruin of thoſe who reſpect his character, by laying ſnares for them, by clandeſtinely injuring them, by perplexing and ruining their affairs, is a baſe treachery. What would be infamous and abominable in a private gueſt, ſhall that be allowable and becoming in the repreſentative of a ſovereign?

Here ariſes an intereſting queſtion, it is but too common for ambaſſadors to practice on the fidelity of the miniſters of the court to which they are ſent, and on the ſecretaries and others employed in offices. What is to be thought of this practice? To corrupt a perſon, or to ſeduce a perſon by the powerful allurement of gold, to betray his prince, and violate his duty, is inconteſtably, according to all the principles of morality, an evil action. How comes it then that ſo little ſcruple is made of it in public affairs? A wiſe and virtuous politician (*b*) ſufficiently gives us to underſtand that he abſolutely diſapproves of this ſcandalous reſource; but to *avoid being*

(*b*) M. Pecquet, Diſcours ſur l'art de negocier. p. 91, 92.

ſtoned in the political world, he goes no further than to ſay, he adviſes not to make uſe of it but in the total want of every other reſource. But for my part, as I write on the ſacred and invariable principles of right, I muſt, in duty to the moral world, openly aver, that corruption is a method contrary to all the rules of virtue and probity, and that it evidently offends againſt the law of nature. Nothing can be conceived more flagitious, more oppoſite to the mutual duties of men, than inducing any one to do evil. The corruptor certainly is guilty towards the wretch whom he ſeduces; and as to the ſovereign whoſe ſecrets are thus betrayed, is it not offending and wronging him to make uſe of the free acceſs allowed to a foreign miniſter at his court, for corrupting the fidelity of his ſervants? He may order the corruptor to depart, and demand juſtice of his conſtituent.

If ever bribery be excuſable, it is when it happens to be the only way for coming at a diſcovery of, and defeating a heinous plot, capable of ruining the ſtate which we ſerve, or of bringing it into great danger. In betraying ſuch a ſecret there may, according to circumſtances, be little guilt. The great and lawful advantage accruing from the action, drawn from the urgent neceſſity of having recourſe to it, may excuſe us from too ſcrupulous an attention to what may be exceptionable in it on the part of the perſon bribed. To gain him is no more than an act of ſimple and juſt defence. Every day in order to baffle the machinations of the wicked, men are under a neceſſity of practiſing on the vicious diſpoſitions of others. On this footing it is that Henry IV. ſaid to the Spaniſh ambaſſador, *That an ambaſſador may bribe to detect the intrigues carrying on againſt his maſter's ſervice*; adding, that the caſes of Marſeilles, of Metz, and ſeveral others, ſufficiently ſhewed that he might very well endeavour to dive into the deſigns forming at Bruſſels againſt the tranquillity of his kingdom. That great prince unqueſtionably did not think that bribery was always excuſable

excuſable in a foreign miniſter; he himſelf having ordered Bruneau, ſecretary to the Spaniſh ambaſſador, to be taken into cuſtody for having tampered with Mairargues, that Marſeilles might be delivered up to the Spaniards.

Barely to make uſe of a traitor's offers, without any previous ſeducement, is leſs contrary to juſtice and probity. But the above-mentioned example of the Romans (Book III. Sect. 155. 181.) which related to declared enemies; theſe inſtances, I ſay, ſhew that a great ſoul rejects even this method, diſdaining to encourage venality and treachery. A prince or a miniſter, with ſentiments not inferior in generoſity to thoſe ancient Romans, will never cloſe with the offers of a traitor, unleſs obliged to it by a ſevere neceſſity, and then not without a ſenſible concern, that he muſt owe his ſafety to ſuch an unbecoming expedient. But I do not here mean to condemn the polite methods, nor even preſents or promiſes which an ambaſſador employs for procuring friends to his maſter. To conciliate affections is not corrupting and alluring into guilt; and it is the concern of theſe new friends that their inclination for a foreign prince may never warp them from the fidelity which they owe to their ſovereign.

§ 94. How he may be corrected, firſt with regard to common faults.

Should an ambaſſador forget the duties of his ſtate, ſhould he render himſelf diſagreeable and dangerous, form cabals and enterpriſes pernicious to the tranquillity of the citizens, the ſtate, or prince to whom he is ſent, there are ſeveral ways of correcting him proportionate to the nature and degree of his fault. If he maltreats the ſubjects of the ſtate, if he commits any acts of injuſtice or violence towards them, the ſubjects injured are not to ſeek redreſs from the common magiſtracy, the ambaſſador being independent of their juriſdiction; conſequently thoſe magiſtrates cannot proceed directly againſt him. On ſuch occaſions the ſovereign is to be applied to, he demands juſtice from the ambaſſador's maſter, and in caſe of a refuſal, may order the inſolent miniſter to quit his dominions.

Should

§ 95. 2d. for faults committed againſt the prince.

Should a foreign miniſter offend the prince himſelf, be wanting in reſpect to him, and by his intrigues raiſe diſturbances in the ſtate and court, the injured prince, from a particular regard to the miniſter's maſter, ſometimes requires that he ſhould be recalled, or if the fault be more heinous the prince forbids him the court, till he receives an anſwer from his maſter; but in important caſes he proceeds ſo far as to order him to quit his dominions.

§ 96. Right of ordering away an ambaſſador who is guilty, or juſtly ſuſpected.

Every ſovereign has an unqueſtionable right to proceed in this manner; for being maſter in his own dominions, no foreigner can ſtay at his court, or in his dominions, without his permiſſion. And though ſovereigns are generally obliged to hear the overtures of foreign powers, and to admit their miniſters, this obligation ceaſes intirely with regard to a miniſter, who being himſelf wanting in the duties incumbent on him from has character, becomes dangerous or juſtly ſuſpected by him, to whom he is to come only as a miniſter of peace. Can a prince be obliged to allow that a ſecret enemy, who diſturbs the ſtate, and is plotting the ſubverſion of it, ſhall remain in his dominions, and appear at his court? It was a ridiculous anſwer of Philip II. to Queen Elizabeth, who had deſired him to recall his ambaſſador, as having detected him in carrying on dangerous practices. The King of Spain would not recall him, ſaying, "That the condition of princes would be very unhappy, "were they obliged to recall their miniſters whenever his "conduct did not ſuit the humour and intereſt of thoſe "with whom he was negociating." Much more unhappy would the condition of princes be, were they obliged to ſuffer in their ſtates, and at their court, a miniſter who was diſagreeable or juſtly ſuſpected, an incendiary, an enemy diſguiſed under the character of an ambaſſador, who would avail himſelf of ſuch inviolability, boldly to form pernicious enterpriſes. The Queen juſtly offended at Philip's denial, put a guard on the ambaſſador. (c)

(c) Wicquefort, ubi ſupra.

But

§ 97. Right of checking him by force, if he behaves as an enemy.

But is an ambaſſador, whatever enormities he gives himſelf up to, only to be ordered out of the country? This ſome authors affirm, grounding their opinion on the perfect independency of a public miniſter. I own he is independent of the juriſdiction of the country, and I have already ſaid that, on this account the common migiſtrate cannot proceed againſt him. I further admit, that for all kinds of common faults, for affronts and diſorders whereby the citizens and ſocieties are injured, but without affecting the ſtate or the ſovereign, this regard is due to a character ſo neceſſary for the correſpondence of nations and to the dignity of the prince repreſented, that the conduct of his miniſter ſhould be complained of to him, and reparation demanded; and if nothing can be obtained, and the importance of his faults abſolutely requires that a ſtop may be put to them, not to carry reſentment beyond an abrupt diſmiſſion. But ſhall an ambaſſador with impunity cabal againſt the ſtate where he reſides, plot its ruin, ſtir up the ſubjects to revolt, and confidently foment the moſt dangerous conſpiracies, under the aſſurance of being ſupported by his maſter? If he behaves as an enemy, ſhall it not be allowable to treat him as ſuch? The caſe is unqueſtionable with regard to an ambaſſador who takes arms, and uſes violence, for then he whom he attacks may repel him, ſelf-defence being a part of the law of nature. Thoſe Roman ambaſſadors who being ſent to the Gauls, fought againſt them with the people of Cluſium, diveſted themſelves of their character. Is it to be thought that in battle the Gauls were to ſpare them? (*d*)

§ 98. Of an ambaſſador forming dangerous plots and conſpiracies.

The queſtion is more difficult with regard to an ambaſſador who, without proceeding to open acts, ſets on foot dangerous practices, and by his intrigues incites ſubjects to revolt, forms and encourages conſpiracies againſt the ſovereign or againſt the ſtate. May not a traitor, who abuſes

(*d*) Tit. Liv. Lib. V. Cap. XXVI. where the hiſtorian peremptorily decides, that theſe ambaſſadors violated the laws of nations: *Legati contra jus gentium arma ceperunt.*

his

his character, and firſt violates the laws of nations, be checked and exemplarily puniſhed? that ſacred law provides no leſs for the ſafety of the prince receiving an ambaſſador, than for that of the ambaſſador himſelf. But on the other hand, if we allow the prince offended a right of puniſhing a foreign miniſter, in ſuch a caſe the ſubjects of conteſt and ruptures betwixt powers will become very frequent; and it is much to be feared that the character of an ambaſſador would want that ſafety which is neceſſary to it. There are certain practices connived at in foreign miniſters, though they be not always very becoming: there are others which are not to be corrected by puniſhments, but by ordering the miniſter to depart. How ſhall theſe different degrees of treſpaſs be always ſettled? The intrigues of a miniſter againſt whom there is concerted a deſign of moleſting, will be repreſented in odious colours, his intentions and proceedings will be calumniated by ſiniſter conſtructions, even falſe accuſations will be raiſed againſt him. In fine, enterpriſes of this kind are generally attended with precaution, and conducted ſo clandeſtinely that a full proof of them is difficult, and ſcarce ever to be come at but through the formalities of juſtice; and to theſe formalities there is no ſubjecting a miniſter who is independent of the juriſdiction of the country.

In laying down the grounds of the voluntary law of nations (Prelim. Sect. 21.) we have ſeen that nations ſometimes neceſſarily, and in regard to the public good, are to recede from certain rights, which, taken in themſelves and abſtracted from every other conſideration, ſhould naturally belong to them. Thus only the ſovereign whoſe cauſe is juſt, has in reality all the rights of war (Book III. Sect. 188.) yet is he obliged to look on his enemy as having rights equal with himſelf, and to treat him conformably (Ibid. Sect. 190, 191.). The ſame principles muſt be our rule here. And it muſt be acknowledged that, in regard to the great uſefulneſs and even neceſſity of embaſſies, ſovereigns are obliged

to

to reſpect the inviolability of an ambaſſador whilſt not incompatible with their own ſafety and the welfare of their ſtate. Conſequently when the practices of the ambaſſador have tranſpired, and his plots are diſcovered, when the danger is ſo far off that it may be prevented without laying hands on him, the general right of puniſhing a traitor, a ſecret enemy, muſt be renounced in conſideration of the character, only diſmiſſing abruptly the guilty miniſter, and requiring further puniſhment of the ſovereign on whom he depends. Indeed this is no more than what moſt nations, and eſpecially the Europeans, agree in. Wicquefort (*e*) gives us ſeveral inſtances of ſome of the moſt powerful princes of Europe, who on diſcovering ambaſſadors to be guilty of odious practices, have only ordered them to depart, and ſometimes without ſo much as requiring any puniſhment from their maſters; of whom indeed they had little hopes of obtaining it. To theſe inſtances let us add that of the Duke of Orleans, regent of France. This prince ſhewed great moderation towards the prince of Cellemare, ambaſſador from Spain, who had fomented a dangerous conſpiracy againſt him, only ſetting a guard over the ambaſſador's houſe, ſeizing his papers, and cauſing him to be conducted out of the kingdom. In the hiſtory of Rome we meet with a very remarkable inſtance of the ambaſſadors of Tarquin; they came to Rome on pretence of claiming the patrimonial eſtate of their maſter's, who had been dethroned, but they practiſed on the profligate young nobility, and drew them into a horrible treaſon againſt their country. Though the miſbehaviour of theſe ambaſſadors rendered them liable to be treated as enemies, yet the conſuls and ſenate ſpared their perſons in regard of the law of nations. (*f*) The ambaſſadors were ſent back without any other puniſhment; but it appears by Livy's account that the letters which they

(*e*) Ambaſſador, Book I. Sect. 27, 28, 29.

(*f*) *Et quanquam viſi ſunt (legati) commiſiſſe, ut hoſtium loco eſſent, jus tamen gentium valuit.* Tit. Liv. Lib. II. Cap. IV.

had

had from the conſpirators to Tarquin, were taken from them.

§ 99. What is allowable againſt him according to the exigency of the caſe.

This example leads us to the true rule of the law of nations, in the caſes now in queſtion. An ambaſſador cannot be puniſhed becauſe he is independent, and from the reaſons we have alledged, it is not proper to treat him as an enemy, till he himſelf proceeds to violence and open acts; but whatever the care of averting the evil which he has contrived, and that of defeating his machinations requires, all this may be done againſt him. If to diſconcert and prevent a conſpiracy, it were neceſſary to arreſt, or even to put to death, an ambaſſador who animates or conducts it, I ſee no cauſe for heſitation, not only becauſe the ſafety of the ſtate is the ſupreme law, but likewiſe, independently of that maxim, the ambaſſador's own deeds, have given a perfect and particular right of coming to ſuch extremities. The public miniſter is certainly independent, and his perſon ſacred; but it is unqueſtionably lawful to repel his attacks either ſecret or open, and to defend ourſelves againſt him, whenever he acts either as an enemy or a traitor. And if we cannot ſave ourſelves without his being a ſufferer by it, it is he who has laid us under a neceſſity of not ſparing him. It may then be reaſonably ſaid, that the miniſter excludes himſelf from the law of nations. I ſuppoſe that the ſenate of Venice, on detecting the Marquis of Bedmar's conſpiracy, though convinced that this ambaſſador was the ſoul which actuated the whole, wanted other lights for ſuppreſſing that horrible deſign: That they were uncertain about the number and rank of the conſpirators, about the deſign of the conſpiracy, and the place where it was to break out; that they doubted whether the fleet or the land forces were to be practiſed upon for a revolt, or whether ſome important place was to be ſurpriſed. Was it under any obligation to let the ambaſſador depart at liberty, and thereby give him an opportunity of putting himſelf at the head of his accomplices, and making a puſh for carrying his

his deſign? This cannot be ſeriouſly ſaid. The ſenate therefore had a right to arreſt the marquis and all his family, and even to extort their deteſtable ſecret from them. But theſe prudent republicans ſeeing the danger over, and the conſpiracy totally ſuppreſſed, choſe to carry it fair with Spain, by forbidding any one to accuſe the Spaniards of having any ſhare in the plot; all they did was to deſire the ambaſſador to withdraw, that he might ſave himſelf from the rage of the people.

§ 100. Of an ambaſſador who ſhould attempt the prince's life.

Here the ſame rule is to be followed, which we have laid down (Book III. Sect. 136.) in treating of what is allowable againſt an enemy. Whenever the ambaſſador acts as an enemy, whatever is neceſſary for overthrowing his evil deſigns, and ſecuring ourſelves, is allowable againſt him. From this ſame principle, and the idea of an ambaſſador's being a public enemy when he behaves as ſuch, we ſhall likewiſe determine his fate, in caſe he ſhould carry his exceſſes to the higheſt degree of guilt. If an ambaſſador commits ſuch atrocious crimes, as affect the ſafety of mankind; if he undertakes to aſſaſſinate or to poiſon the prince, who has received him at his court, he doubtleſs deſerves to be puniſhed as a treacherous enemy, as a poiſoner and aſſaſſin (Book III. Sect. 155.) His character, which he has ſo baſely ſtained, cannot ſhelter him from puniſhment. Is the law of nations to protect a criminal, when the ſafety of all princes, and the welfare of mankind call for his puniſhment? Indeed it is little to be expected, that a public miniſter ſhould run ſuch horrible lengths. Thoſe inveſted with this character are generally perſons of honour, and if there ſhould be found among them any who ſtick at nothing, the difficulties and greatneſs of the danger are ſufficient to deter them. Yet we are not without inſtances of theſe crimes. M. Barbeyrac (*g*) relates the aſſaſſination of the Lord of Sirmium, by an ambaſſador of Conſtantine

(*g*) In his notes on BYNKERSHOEK's treatiſe on the competent judge of ambaſſadors. Chap. XXIV. Sect. 5. Not. 2.

Diogenes,

Diogenes, governor of the neighbouring province for Baſilius II. Emperor of Conſtantinople, and cites the hiſtorian Credenus. The following fact is likewiſe to the purpoſe: CHARLES III. King of Naples, having in 1382, ſent to his competitor Louis Duke of Anjou, a knight, named Matthew Sauvage, in quality of a herald, to challenge him to a ſingle combat; the herald was ſuſpected of carrying a demi-lance, the point of which was thought to be dipped in a poiſon of ſuch ſubtlety, that a perſon looking ſtedfaſtly on it, or ſuffering it merely to touch his clothes, inſtantly died. The duke, being adviſed of the danger, not only refuſed to ſee the herald, but cauſed him to be taken into cuſtody; and being examined, he was beheaded on his own confeſſion. Charles complained of the puniſhment of his herald, as a cruel infraction of the laws and cuſtoms of war. Lewis, in his anſwer maintained, that by executing the herald on his own confeſſion, he had not violated the laws of war (*h*). Had the crime imputed to the knight been well proved, the herald would have been an aſſaſſin, which no law could protect. But the very nature of the accuſation ſufficiently ſhews the falſity of it.

§ 101. Two remarkable inſtances concerning the immunities of public miniſters.

The queſtion of which we have been treating has been debated in England and France, on two famous occaſions. At London on account of John Leſley biſhop of Roſs, ambaſſador from Mary Queen of Scotland. This miniſter was continually intriguing againſt Queen Elizabeth, and the tranquillity of the ſtate, forming conſpiracies, and exciting the ſubjects to rebellion. Five of the moſt able civilians being conſulted by the privy council, gave it as their opinion, *That an ambaſſador raiſing a rebellion againſt the prince at whoſe court he reſides, forfeits the privileges of his character, and is ſubject to the puniſhment of the law.* They ſhould rather have ſaid, that he ſhould be treated as

(*h*) Hiſtory of the kings of the two Sicilies, by M. D'EGLY.

an

an enemy. But the council only cauſed the biſhop to be taken into cuſtody, and after keeping him priſoner in the Tower two years, when nothing more was to be feared from his intrigues, he was ſet at liberty, and obliged to leave the kingdom (*i*). This inſtance may confirm the principles here laid down; and the like may be ſaid of the following. Brenau, ſecretary to the Spaniſh ambaſſador in France, was ſurpriſed treating with Mairargues in a profound peace, to engage him to deliver up Marſeilles to the Spaniards. On this he was impriſoned, and the parliament, at the trial of Mairargues likewiſe interrogated Brenau; but inſtead of proceeding to condemn him, ſent him to the king, who ordered him to return to his maſter, and immediately to depart the kingdom. The ambaſſador warmly complained of the detention of his ſecretary: but Henry IV. very judiciouſly anſwered, *That the law of nations does not forbid putting a public miniſter under an arreſt, in order to hinder him from doing miſchief.* The king might have added, that he had the ſame right of putting in practice againſt the miniſter whatever was neceſſary to preſerve himſelf from the miſchief he intended; for baffling his projects, and preventing the conſequences of them. It was this authoriſed the parliament to examine Brenau, in order to diſcover all who had engaged in ſo dangerous a deſign. The queſtion whether if foreign miniſters violate the law of nations, they forfeit their privileges, was warmly diſputed at Paris. But the king reſtored Brenau to his maſter, without waiting for the deciſion (*k*).

§ 102. Whether repriſals may be uſed towards an ambaſſador.

An ambaſſador is not to be uſed ill by way of repriſals; for a prince uſing violence againſt a public miniſter, commits a crime which is not to be revenged by an imitation of it. Actions in their own nature unlawful, are never

(*i*) Cambden's Annal. Ang. ad. ann. 1571, 1573.

(*k*) See this diſpute, and the diſcourſe which Henry IV. held on this ſubject to the ambaſſador of Spain, in the memoirs of M. Nevers, Vol. II. page 858, and following; in Matthieu. Vol. II. Book III. and other hiſtorians.

to

to be committed on pretence of repriſals; and ſuch unqueſtionably are any abuſe or ill treatment done to a miniſter on account of the faults of his maſter. If it be in general indiſpenſably neceſſary to obſerve this rule in the affair of repriſals, the reſpect due to the character of an ambaſſador renders it particularly obligatory. The Carthaginians having violated the law of nations with reſpect to the ambaſſadors of Rome, ſome of the ambaſſadors of that perfidious people were brought to Scipio, and he was aſked, what he would have done to them? *Nothing, ſaid he, that reſembles what the Carthaginians have done to us*, and ſent them away in ſafety (*l*). But at the ſame time prepared to chaſtiſe by force of arms, the ſtate which had violated the law of nations (*m*). There cannot be a better pattern for ſovereigns to follow on ſuch an occaſion. If the injury for which we would uſe repriſals does not concern a public miniſter, it is ſtill much more certain, that they are not to be exerciſed againſt the ambaſſador of the power againſt whom we complain. The ſafety of public miniſters would be very uncertain, did it depend on all the differences that may ariſe; but there is a caſe in which it appears very allowable to put an ambaſſador under an arreſt, but care muſt be taken that this be the only ill treatment he ſuffers. When a prince, contrary to the law of nations, has cauſed our ambaſſadors to be arreſted, we may arreſt and detain his, as a pledge for the life and liberty of ours. But ſhould this method fail, we ſhould releaſe the innocent ambaſſador, and do ourſelves juſtice by more efficacious means. CHARLES V. arreſted the ambaſſador of France, after that kingdom had

(*l*) APPIAN cited by GROTIUS, Lib. II. Cap. XXVIII. Sect. 7. According to DIODORUS SICULUS, SCIPIO ſaid to the Romans, *Do not imitate what you conſider as the reproach of the Carthaginians*: Σκίπιων, οὐκ, ἔφη δεῖν ποιεῖτε, ὃ τοῖς Καρχηδονίοις ἐγκαλοῦσι. DIOD. SICUL. Exerp. Peireſc. p. 290.

(*m*) TIT. LIVY, Lib. XXX. Cap. XXV. That hiſtorian makes SCIPIO ſay; "Though the Carthaginians "have violated the faith of the "truce, and the law of nations, in "the perſon of our ambaſſadors, I "will do nothing againſt theirs un- "worthy of the maxims of the Ro- "man people, and of my principles."

declared

declared war againſt him, on which FRANCIS I. did the like to GRANVILLE, the emperor's ambaſſador; but it was at length agreed, that both the ambaſſadors ſhould be conducted to the frontiers, and releaſed at the ſame time (*n*).

§ 103. Agreement of nations concerning the privileges of ambaſſadors.

We have derived the independency and inviolable character of an ambaſſador, from the natural and neceſſary principles of the law of nations. Theſe prerogatives are farther conferred on him by cuſtom and general conſent. We have ſeen above (Sect. 84.) that the Spaniards found the right of embaſſies eſtabliſhed and reſpected in Mexico, as it is known to be among the Indian nations in North America. If we caſt our eye on the other extremity of the earth, we ſhall ſee ambaſſadors highly reſpected in China: they are likewiſe ſo in India: but indeed leſs religiouſly (*o*). The King of Ceylon has ſometimes impriſoned the ambaſſadors of the Dutch Eaſt-India company. Being maſter of the places which produce cinnamon, he knows that the Dutch, in conſideration of a profitable commerce, will overlook many things in him, and of this he barbarouſly takes advantage. The Koran enjoins the muſſelmen to reſpect public miniſters, and if the Turks have not always conformed to this precept (*p*), it is rather to be imputed to the ferocity of ſome princes than to the principles of the nation. The rights of ambaſſadors are very well known to the Arabians: An author of that nation relates the following paſſage: KHALED, an Arabian general, coming in the quality of ambaſſador to the army of the emperor HERACLIUS, uſed inſolent language to the general, on which the latter ſaid to him, *That, by the law admitted among all nations, ambaſſadors were ſecured from every violence, and that probably he built on this privilege to ſpeak in ſo indecent a manner* (*q*). It would be quite uſeleſs to accu-

(*n*) MEZERAY's hiſt. of France, Vol. II. p. 470.

(*o*) General hiſt. of voyages, article of China and the Indies.

(*p*) ALVAKEDI's hiſtory of the conqueſt of Syrie.

(*q*) OCKLEY's hiſtory of the Saracens, Vol. I. p. 294, of the French tranſlation.

mulate

mulate here examples taken from the hiſtory of European nations; they are innumerable, and the cuſtoms in this reſpect are ſufficiently known. St. Lewis, when at Acre, gave a remarkable inſtance of the ſafety due to public miniſters: An ambaſſador *from the old man of mountain*, or *prince of the aſſaſſins*, ſpeaking inſolently to him, the grand maſters of the knights templers told the miniſter, *That were it not for the reſpect of his character, they would immediately cauſe him to be thrown into the ſea* (*r*). The king diſmiſſed him without ſuffering the leaſt inſult to be offered to him: yet as the prince of the *aſſaſſins* violated the moſt ſacred laws of nations, no ſecurity ſeemed due to his ambaſſador; but this ſecurity being founded on the neceſſity of ſovereigns preſerving the means of reciprocally communicating their propoſals, and treating with each other in peace and war, it ought to extend even to the envoys of the princes who, having themſelves violated the law of nations, would otherwiſe be unworthy of any regard.

§ 104. Of the free exerciſe of religion.

There are rights of another nature, which though not neceſſarily annexed to the character of a public miniſter, cuſtom generally attributes to him. One of the principal is the free exerciſe of his religion. It is indeed highly proper that a miniſter, and eſpecially a reſident miniſter, ſhould be at liberty freely to exerciſe his religion within his own houſe, for himſelf and his retinue. But it cannot be ſaid, that this right, like independency and an inviolable character, is abſolutely neceſſary to the ſucceſs of his commiſſion, particularly in the caſe of a non-reſident miniſter, the only one whom nations are obliged to admit (Sect. 66.). The miniſter, in this reſpect, may do what he pleaſes within his own walls, into which no body has a right to pry, or to enter. But if the ſovereign of the country where he reſides, has good reaſons for not permitting him

(*r*) Choiſy's hiſt. of St. Lewis.

to

to exercise his religion in a manner any way public, this sovereign is not to be blamed, much less accused of offending against the law of nations. At present no civilized country refuses ambassadors this free exercise. For a privilege founded on reason is not to be refused when it is attended with no ill consequence.

§ 105. Whether an ambassador be exempted from all imposts.

Among those rights that are not necessary to the success of embassies, there are some likewise not founded on a general consent of nations; but which are nevertheless, by the custom of several countries, annexed to the character. Such is the exemption from the duties of importation and exportation for things which come into a country for a foreign minister, or which he sends out. There is no necessity for his being distinguished in this respect, since by paying these duties he would not be the less able to discharge his functions. If the sovereign is pleased to exempt him from them, it is a civility which the minister could not claim by any right, no more than that his baggage or any chests, &c. which he sends for from abroad, shall not be searched at the custom-house. THOMAS CHALONER, the English ambassador in Spain, sent home a bitter complaint to Queen Elizabeth his mistress, that the custom-house officers had opened his trunks in order to search them. But the Queen returned him for answer, *That an ambassador was to put up with every thing that did not directly offend the dignity of his sovereign* (*a*).

The independency of the ambassador exempts him indeed from every personal imposition, capitation, or any other duty of that nature, and in general from every impost relating to the quality of a subject of the state. But as for duties laid on any kind of goods or provisions the most absolute independency does not exempt him from the payment of them: foreigners themselves are subjected to them. This is the rule followed in Holland; the ambassadors are ex-

(*a*) WICQUEFORT's Ambass. Book I. Sect. 28. towards the end.

empted from the duties levied on goods conſumed; doubtleſs becauſe the duties more particularly relate to their perſons: but they pay the duties of importation and exportation.

However extenſive their exemption may be, it is manifeſt that it relates only to things for their uſe. Should they abuſe it, ſo as to render it a ſcandalous traffick, by lending their name to merchants, the ſovereign has unqueſtionably a right of putting a ſtop to the fraud, even by ſuppreſſing the privilege. Such things have been known in ſeveral places, and the ſordid avarice of ſome miniſters, who made a trade of their privilege, has obliged the ſovereign to reſume them. At preſent the foreign miniſters at Peterſburgh pay the duties of importation; but the empreſs has the generoſity to make up to them the loſs of a privilege which is not their due, and the abolition of which was become neceſſary by enormous abuſes of it.

§ 106. Of the obligation founded on uſe and cuſtom.

But here it is aſked, whether a nation may aboliſh what general cuſtom has eſtabliſhed with reſpect to foreign miniſters? Let us then conſider what obligation cuſtom and received uſage can lay on nations, not only with regard to miniſters but in every other reſpect. All the uſages and cuſtoms of other nations can no further oblige an independent ſtate, than as it has expreſsly or tacitly conſented to them. But when a cuſtom indifferent in itſelf comes to be once well ſettled and received, it binds the nations that have tacitly or expreſsly adopted it. Yet if a nation afterwards perceives any inconveniencies therein, it is at liberty to declare its intention of no longer conforming to it. And after giving an explicit declaration of this, no cauſe of complaint lies againſt it, for any ſubſequent deviation from that cuſtom which it had formally renounced. But this declaration is to be previouſly made at a time when it affects no particular nation: it is too late when the caſe actually exiſts. It is a maxim generally received, that a law is never to be changed at the time when the caſe

actually

actually ſubſiſts. Thus, in the ſubject before us, a ſovereign having previouſly notified his intentions, and receiving an ambaſſador only on that footing, may diſpenſe himſelf from allowing him all the privileges, or paying him all the honours which cuſtom before attributed to his character, provided theſe privileges, and honours be not eſſential to the embaſſy, and neceſſary to its lawful ſucceſs. To refuſe privileges of the laſt kind, would be the ſame as refuſing the embaſſy itſelf, which a ſtate cannot generally and always do (Sect. 65.) but only for ſome very ſtrong reaſon. To with-hold honours accounted ſacred, and become in ſome meaſure eſſential, is expreſſing contempt and doing an injury.

Here it muſt be further obſerved, that when a ſovereign intends to excuſe himſelf from the future obſervance of an eſtabliſhed cuſtom, the rule muſt be general. To refuſe certain cuſtomary honours or privileges to the ambaſſador of one nation, and to continue the enjoyment of them to others, is an affront to that nation, a mark of contempt, or at leaſt of ill-will.

§ 107. Of a miniſter whoſe character is not public.

Sometimes princes ſend to each other a ſecret miniſter, whoſe character is not public. If ſuch a miniſter be inſulted by a perſon unacquainted with his character, this is no violation of the law of nations; but the prince who receives this ambaſſador, and acknowledges him to be a public miniſter, is obliged to protect him, and cauſe him, as far as in his power, to enjoy all the ſafety and independency which the law of nations attributes to his character. And Francis Sforca Duke of Milan is utterly inexcuſable in putting to death MARAVIGLIA, ſecret miniſter of Francis I. Sforca had often treated with this ſecret agent, and had owned him to be the King of France's miniſter *(b)*.

§ 108. Of a ſovereign in a foreign country.

We cannot introduce in any more proper place an important queſtion of the law of nations, which is nearly

(b) See the Memoirs of MARTIN DU BELLAY, Book IV. and father DANIEL's hiſtory of France, Vol. V. pag. 300, and following.

allied to the rights of embaſſies. It is aſked, what are the rights of a ſovereign who happens to be in a foreign country, and how the maſter of the country is to treat him? If this prince be come to negociate, or to treat about ſome public affair, he is doubtleſs to enjoy all the rights of ambaſſadors in a more eminent degree. If he be come as a traveller, his dignity abſtractively, and the regard due to the nation which he repreſents and governs, ſhelters him from all inſult, intitles him to every kind of complaiſance, friendlineſs and regard, and exempts him from all juriſdiction. On his making himſelf known he cannot be treated as ſubject to the common laws, for it is not ſuppoſable that he has conſented to ſuch a ſubmiſſion; and if a prince will not ſuffer him in his dominions on ſuch a footing, notice muſt be ſent to him, that he would withdraw; but ſhould this foreign prince form any deſign againſt the ſafety and welfare of the ſtate; in a word, ſhould he act as an enemy, he may very juſtly be treated as ſuch. Otherwiſe full ſecurity is due to him, it being due to every ſtranger.

A ridiculous notion has poſſeſſed the mind of many, who think they have their ſhare of wiſdom; theſe will have it that a ſovereign coming into a foreign country may be arreſted there (*c*). On what reaſon can ſuch a violence be grounded? It is an abſurdity which refutes itſelf. A foreign ſovereign indeed is to give notice of his coming, if he deſires to be treated with due ſecurity and honour: it would be likewiſe prudent in him to demand paſſports, that ill-will may have no pretence or hope left for covering

(*c*) It is ſurpriſing to ſee a grave hiſtorian give into this opinion: "See GRAMOND's *Hiſt. Gall. Lib.* XIII. The cardinal de Richelieu alſo alledged this falſe reaſon, when he cauſed to be arreſted CHARLES LEWIS, the Elector Palatine, who had undertaken to croſs France incognito: He ſaid, "No foreign prince is permitted "to paſs through the kingdom with-"out a paſſport." But he added better reaſons, drawn from the Elector Palatine's deſigns on Briſac and other places, left by Bernard Duke of Saxe Weymar, and to which France pretended to have a greater right than any other power, becauſe theſe conqueſts had been made with the money furniſhed by that kingdom. See *the hiſtory of the treaty of Weſtphalia, by father* BOUGEANT, *Vol.* II. *in* 12*mo. pag.* 88.

injuſtice

injuſtice and violence with any ſpecious reaſons. I further allow, that as the preſence of a foreign ſovereign on certain occaſions may be of conſequence, if the times are in any-wiſe critical, and his journey ſuſpected, he is not to undertake it without the conſent of him into whoſe country he would enter. Peter the Great, when he went into foreign countries in queſt of the arts and ſciences, for enriching his empire, uſed to put himſelf among the retinue of his ambaſſadors.

A foreign prince unqueſtionably retains all his rights over his ſtates and ſubjects, and may exerciſe them in whatever does not affect the ſovereignty of the country where he is. Therefore the King of France appears to have been too ſuſpicious in not ſuffering the Emperor Sigiſmund, when at Lyons, to create the Count of Savoy, who was a vaſſal of the empire, a Duke (See Book II. Sect. 40). Nothing of this difficulty would have been made towards another prince, but the former claims of the emperors were guarded againſt even to a ſcruple. On the other hand, it was with a great deal of reaſon that in the ſame kingdom Queen Chriſtiana's executing one of her domeſtics within her own houſe was taken very ill; an execution of ſuch a nature being an act of territorial juriſdiction. And beſides, Chriſtiana had abdicated the crown. Her reſervations, her birth, her dignity, might indeed intitle her to great honours. But not to an intire independence; not to all the rights of an actual ſovereign. The famous inſtance of Mary Queen of Scotland, ſo often alledged on this head, is not very appoſite. This princeſs at her coming into England, where ſhe was arreſted, tried and condemned, did no longer enjoy the crown.

§ 109. Of the deputies of the ſtates.

The deputies ſent to the aſſembly of the ſtates of a kingdom, or a republic, are not public miniſters like thoſe we have ſpoken of, they not being ſent to foreign powers: but they are public perſons, and in this quality have privileges, which we ought to eſtabliſh before we take leave of this ſubject.

ſubject. The ſtates who have a right to meet by deputies, in order to deliberate on public affairs, may on that very account require an intire ſafety for their repreſentatives, and all the exemptions neceſſary to the free diſcharge of their functions. If the perſons of deputies be not inviolable, their conſtituents cannot be aſſured of their fidelity, in aſſerting the rights of the nation, and courageouſly promoting the public welfare. And how could theſe repreſentatives acquit themſelves of their functions, were it allowed to moleſt them by arreſts, either for debts or common treſpaſſes? There are here betwixt the nation and the ſovereign, the very ſame reaſons on which the immunities of ambaſſadors betwixt ſtate and ſtate are founded. Therefore it may be ſaid, that the rights of the nation and public faith ſecure theſe deputies from violence of any kind, or even from any judicial proſecution during the time of their miniſtry. This is alſo obſerved in every other country, and particularly at the diets of the empire, the parliaments of England, and the *cortes* of Spain. HENRY the IIId of France cauſed the duke and cardinal de Guiſe to be killed at the meeting of the ſtates at Blois. Unqueſtionably the ſafety of the ſtates was violated by this action; but thoſe princes were factious rebels, and their audacious views aimed at nothing leſs than depriving the ſovereign of his crown. And if it was equally certain that HENRY was no longer in a condition to bring them to a formal trial, and puniſh them according to the laws; the neceſſity of a juſt defence conſtituted the king's right, and vindicates his proceeding. It is the misfortune of weak and ſhort-ſighted princes, that they ſuffer themſelves to be reduced to extremities, out of which they are to be extricated only by a palpable violation of all orders and regulations. It is ſaid that Pope Sixtus the Vth, on hearing of the cataſtrophe of the Duke de Guiſe, commended that reſolute act, as a neceſſary ſtroke of policy; but when he was told that the cardinal had likewiſe been killed, he flew into

into a flame *(d)*. This was carrying his haughty pretenſions very far. The pontiff readily allowed that urgent neceſſity authorized HENRY's violating the ſafety of the ſtates, and all the forms of juſtice; and could he pretend that this prince, rather than be wanting in reſpect for the Roman purple, ſhould riſque both his crown and life?

CHAP. VIII.

Of the Judge of Ambaſſadors in Civil Caſes.

§ 110. The ambaſſador is exempt from the civil juriſdiction of the country where he reſides.

SOME authors are for ſubmitting the ambaſſador, in civil affairs, to the juriſdiction of the country where he reſides; at leaſt for ſuch as have taken riſe during the time of the embaſſy; and in ſupport of their opinion, they alledge, that this ſubjection does no injury to his character. However ſacred, ſay they, a perſon be, *his inviolability is not affected by ſuing him on a civil action.* But it is not on account of the ſacredneſs of their perſon that ambaſſadors cannot be ſued, it is becauſe they do not depend on the juriſdiction of the country whither they are ſent; and the ſolid reaſons for this independency may be ſeen above (Sect. 92). Let us here add, that it is intirely proper, and even neceſſary, that an ambaſſador ſhould not be liable to any juridical proſecution, even for a civil cauſe, that he may not be diſturbed in the exerciſe of his functions. From a like reaſon it was not allowed among the Romans to ſummon a prieſt whilſt he was employed in his ſacred function *(e)*, but at other times he was open to the law. The reaſon on which this reſts is alledged in the Roman law: *Ideo enim non datur actio* (adverſus lega-

(d) See the French hiſtorians.

(e) Nec pontificem (in jus vocari oportet) dum ſacra facit. *Digeſt. Lib.* II. *Tit.* IV. *de in jus vocando, Lib.* II.

tum)

tum) *ne ab officio ſuſcepto legationis avocetur* (*a*), *ne impediatur legatio* (*b*). But there was an exception relating to the affairs contracted during the embaſſy. This was reaſonable with regard to thoſe *Legati* or miniſters of whom the Roman law here ſpeaks, who being ſent only by nations ſubject to the empire, could not pretend to the independency of a foreign miniſter. Concerning the ſubjects of the ſtate, the legiſlature might preſcribe what ſeemed moſt proper: but a ſovereign has not the like power of obliging the miniſter of another ſovereign to ſubmit to his juriſdiction: and even could he do this by convention, or otherwiſe, it would not be proper: for under this pretence the ambaſſador might be often moleſted in his miniſtry, and the ſtate become involved in unhappy quarrels, for the trifling concerns of ſome private perſons, who might and ought to ſecure themſelves another way. Thus very agreeably to the duties of nations, and conformably to the great principles of the law of nations, the ambaſſador or public miniſter is at preſent by the cuſtom and conſent of all nations, independent of all juriſdiction in the country where he reſides, either for civil or military caſes. I know there have been ſome inſtances to the contrary; but a few facts do not eſtabliſh a cuſtom: on the contrary theſe, by the cenſure paſſed on them, confirm the cuſtom to be as we have ſaid. In the year 1668 the Portugueſe reſident at the Hague was, by an order of the court of juſtice, arreſted and put in priſon for debt. But an illuſtrious member of that ſame court (*c*) very juſtly thinks this procedure unlawful, and contrary to the law of nations. In the year 1657, a reſident of the Elector of Brandenburgh in England, was alſo arreſted for debt. But he was ſet at liberty, the arreſt judged contrary to law, and even the creditors and officers of juſtice concerned in the inſult were puniſhed. (*d*)

(*a*) Digeſt, Lib. V. Tit. I. De judicies, &c. Leg. XXIV.
(*b*) Ibid. Leg. XXVI.
(*c*) M. de BYNKERSHOEK's competent judge of ambaſſadors, Chap. XIII. Sect. 1.
(*d*) Ibid.

But

§ 111. How he may voluntarily ſubject himſelf to it.

But if the ambaſſador will partly recede from his independency, and ſubject himſelf in civil affairs to the jurisdiction of the country, he unqueſtionably may, provided it be done with his maſter's conſent. But without ſuch a conſent the ambaſſador has no right to wave privileges in which the dignity and ſervice of his ſovereign are concerned: which are founded on the maſter's rights, and made for his advantage, and not for that of the miniſter. Indeed the ambaſſador, without waiting his maſter's leave, acknowledges the juriſdiction of the country when he makes himſelf plaintiff in a cauſe: but this is inevitable, and beſides, in a civil cauſe, on a point of private intereſt, it has no inconveniency, it being always in the ambaſſador's breaſt not to become plaintiff, and if it be requiſite he ſhould, he can recommend the proſecution of his cauſe to a lawyer.

Let us add here by the way, that he is never to be plaintiff for a criminal cauſe; if he has been inſulted, the throne is the place where he is to make his complaint; and the delinquent is to be proſecuted by the public.

§ 112. Of a miniſter ſubject to the ſtate where he is employed.

It may happen that the miniſter of a foreign power is at the ſame time a ſubject of the ſtate where he is employed; and, in this caſe as a ſubject, he is unqueſtionably under the juriſdiction of the country in whatever does not directly relate to his miniſtry. But it is required to know in what caſes theſe two qualities of ſubject and foreign miniſter, become united in the ſame perſon. It is not ſufficient for this that the miniſter be born a ſubject to the ſtate to which he is ſent; for unleſs, by the laws, every citizen is expreſsly precluded from leaving his country, he may legally have renounced his country, and put himſelf under a new maſter. He may likewiſe, without renouncing his country for ever, become independent of it during the whole time of his being in the ſervice of a foreign prince; and the preſumption is certainly in favour of this independence. For the ſtate and functions of a public

miniſter

miniſter naturally demand that he ſhould depend only on his maſter (Sect. 92.) on the prince whoſe affairs he is negociating. Therefore nothing deciding or indicating the contrary, a foreign miniſter though ſubject to the ſtates is, during the whole time of his commiſſion, reputed to be abſolutely independent of it. If his former ſovereign is not for granting him this independency in his country, he may refuſe to receive him as a foreign miniſter; as is practiſed in France, where according to M. de Callieres *(a)*, *the king no longer receives any of his ſubjects as miniſters of foreign princes.*

But a ſubject of the ſtate may even in accepting the commiſſion of a foreign prince, remain a ſubject. His ſubjection is expreſsly eſtabliſhed when the ſovereign acknowledges him as a miniſter only with a reſerve that he ſhall remain a ſubject to the ſtate. The States General of the United Provinces, in a placart of the 19th of June 1681, declare, "That no ſubject of the ſtate ſhall be received as ambaſſador or miniſter of another power, but on condition that he ſhall not diveſt himſelf of his quality of ſubject, even with regard to the juriſdiction both in civil and criminal affairs, and that whoever, in making himſelf known as ambaſſador or miniſter, has not mentioned his quality of ſubject to the ſtate, he ſhall not enjoy thoſe rights or privileges which are peculiar to the miniſters of foreign powers *(b)*."

Such a miniſter may likewiſe retain his former ſubjection *tacitly*, and then by a natural conſequence drawn from his actions, ſtate, and whole behaviour, it is known that he continues a ſubject. Thus, notwithſtanding the declaration above-mentioned, thoſe Dutch merchants who procure to themſelves the title of reſidents of ſome foreign princes, yet continue in trade, thereby ſufficiently denote that they remain ſubjects. Whatever inconveniencies

(a) Manner of negociating with ſovereigns, Chap. VI.
(b) BYNKERSHOEK, *ubi ſupra*, Chap. XI.

there

there may be in the ſubjection of a miniſter to the ſovereign with whom he reſides, if the foreign prince will put up with ſuch inconveniencies, and is contented with a miniſter on that footing, it is his own doing, and ſhould his miniſter on any ignominious occaſion be treated as a ſubject, he has no cauſe of complaint.

It may likewiſe happen, that a foreign miniſter makes himſelf a ſubject of the power to whom he is ſent, by accepting of a poſt under him; and in this caſe he can claim independency only in ſuch things as are directly relative to his miniſtry. The prince who ſends him, in allowing of this voluntary ſubjection, agrees to riſque the inconveniencies that attend it. Thus, in the laſt century, the Baron de CHARNACE and the Count d'ESTRADES were ambaſſadors from France to the States General, and at the ſame time officers in their High Mightineſſes army.

§ 113. How the exemption of the miniſter extends to his poſſeſſions.

The independency of the public miniſter is the true reaſon of his exemption from the juriſdiction of the country in which he reſides. No juridical action can be directly ſerved on him, as he is not ſubject to the prince or the magiſtrates. Does this exemption of his perſon extend itſelf to all his poſſeſſions indiſcriminately? for ſolving this queſtion we muſt conſider what can ſubject poſſeſſions to the juriſdiction of a country, and how they may be exempted. In general whatever is within the extent of a country is ſubject to the authority of the ſovereign (Book I. Sect. 205. and Book II. Sect. 83, 84). If any diſpute ariſes concerning effects or goods within the country, or paſſing through it, it is to be decided by the judge of the place. In virtue of this dependency the method of arreſts or ſeizures has been eſtabliſhed in many countries, to oblige a ſtranger to come to the place where the arreſt has been made, in order to anſwer to any queſtion that may be put to him, though not directly relative to the effects ſeized. But as we have ſhewn, a foreign miniſter is independent of the juriſdiction of the country, and his perſonal

perſonal independency as to civil caſes would be of no great ſignification, did it not extend to every thing neceſſary to his living with dignity, and the quiet diſcharge of his functions. Beſides, whatever he has brought with him, or purchaſed for his uſe as miniſter, is ſo connected with his perſon as to follow its fate. From the independency in which the miniſter comes, it is not to be ſuppoſed that he means to ſubject his retinue, his baggage, and neceſſaries, to the juriſdiction of the country. Therefore every thing belonging to the miniſter's perſon, as a public miniſter, whatever is for his uſe, whatever ſerves for the ſubſiſtence of himſelf, and that of his houſhold; theſe, I ſay, partake of the miniſter's independency, and are abſolutely exempt from any juriſdiction in the country. Theſe things, like the perſon to whom they belong, are conſidered as if they were out of the country.

§ 114. The exemption cannot extend to effects belonging to any trade the miniſter may carry on.

But this cannot take place in effects manifeſtly belonging to the ambaſſador, under another relation than that of miniſter. What has no affinity with his functions and character, cannot partake of the privileges derived only from his function and character. Should then a miniſter, as it has been often ſeen, engage in trade, all the effects, goods, money, and debts, active and paſſive, belonging to his commerce, come within the juriſdiction of the country. And though theſe proceſſes cannot be directly addreſſed to the miniſter's perſon, by reaſon of his independency, he is by the ſeizing of the effects belonging to his commerce, indirectly brought to a neceſſity of anſwering by ſuch ſeizure. The abuſes ariſing from a contrary practice are manifeſt. What could be expected from a merchant, with a privilege of committing in a foreign country all kinds of injuſtice; there is no manner of reaſon for extending the exemption of the miniſter to things of this nature. If the maſter apprehends any inconveniency

niency from the indirect dependence which his minister thus brings on himself, it is only forbidding him a traffick, which indeed little becomes the dignity of his character.

To what we have said, let us add two illustrations: 1. In case of doubt, the respect due to the character requires that things be always explained to the advantage of that character. I mean that when there is cause for doubting whether a thing be really for the use of the minister or his household, or whether it belongs to his commerce, the decision must be given on the minister's side, otherwise there would be a risk of violating his privileges. 2. When I say that such effects of the minister, that had no relation to his character, and that belong to his private trade, are seizable, this must be understood with a supposition that it be not for any cause arising from concerns of the minister in his quality of minister, as for things supplied to his house, for rent, &c. For affairs against him under this relation, cannot be tried in the country, nor consequently be subjected to the jurisdiction by the indirect way of arrests.

§ 115. Not to immoveables which he possesses in the country.

All estates, all immoveable goods, depend on the jurisdiction of the country, whoever be the proprietor (Book I. Sect. 205. Book II. Sect. 83, 84.) Are they to be exempted from it only because the owner of them is appointed to be the ambassador of a foreign power? There is no reason for this. The ambassador does not hold those possessions as ambassador; they are not annexed to his person so as, like himself, to be reputed out of the territory. If a foreign prince apprehends any ill consequences from this dependency, in which his minister may be on account of some of his possessions, he may make choice of another. Thus the immoveables possessed by a foreign minister do not alter their nature, by the quality of the owner, and they remain under the jurisdiction of the state where they lie. Every dispute, every process concerning them, is to be

be carried before the tribunals of the country, which for a juſt cauſe may likewiſe order the ſeizure of them. It is however eaſily conceived, that if this ambaſſador lives in a houſe of his own, this houſe is excepted from the rule, as actually ſerving for his immediate uſe, except, I ſay, in whatever may affect the uſe which the ambaſſador at that time makes of it.

It may be ſeen, in M. de Bynkerſhoek's judicious treatiſe(*a*), that cuſtom coincides with the principles here laid down and in the preceding paragraph. In ſueing an ambaſſador on any of the two caſes juſt mentioned, that is, with regard to ſome immoveable lying in the country, or moveable effects of no relation to the embaſſy, the ambaſſador is to be ſummoned in the ſame manner as an abſent perſon, he being reputed out of the country, and his independency does not permit any immediate addreſs to his perſon in an authoritative manner, ſuch as ſending an officer of a court of juſtice to him.

§ 116. **How juſtice may be obtained againſt an ambaſſador.**

What way is there then of obtaining ſatisfaction from an ambaſſador refuſing to do juſtice in any dealings which others may have with him? Many ſay, that he is to be ſued in the tribunal to which he was ſubject before his embaſſy. To me this ſeems ſomething irregular. If the neceſſity and importance of his functions ſet him above all proſecution in the foreign country where he reſides, ſhall it be allowable to moleſt him by a ſummons before the courts of his own country? This the good of the public ſervice declares againſt; the miniſter muſt depend ſolely on the ſovereign to whom he belongs, in a manner intirely peculiar; he is an inſtrument in the hand of the conductor of the nation, of which nothing is to divert or obſtruct the ſervice. Neither would it be juſt that the abſence of a perſon charged with the intereſts of the ſovereign and the nation, ſhould hurt his private

(*a*) Du judge competent des ambaſſadeurs, Chap. XVI. Sect. 6.

affairs,

affairs. Every where, in all countries, they who are abſent on the ſervice of the ſtate have privileges which ſecure them from any inconveniencies during their abſence. But theſe privileges of the miniſters of the ſtate ſhould, as far as poſſible, be ſo modelled and tempered, as not to be productive of any conſiderable damage or inconveniency to private perſons who have dealings with them. How then are the different intereſts, the ſervice of the ſtate and the adminiſtration of juſtice to be reconciled? All private perſons, citizens or ſtrangers, who have any demands on a miniſter, if they cannot obtain juſtice from himſelf, ſhould apply to the ſovereign his maſter, who is obliged to do them juſtice, in a manner moſt agreeable to the public ſervice. The prince is conſider whether it be fit to recall his miniſter, to appoint a tribunal before which he may be ſued, or to order delays, &c. In a word, the good of the ſtate does not allow that any perſon whatever ſhould diſturb the miniſter in his functions, or divert him from them without the ſovereign's leave; and the ſovereign, his ſupreme duty being obliged to do juſtice to all, ought not to countenance his miniſter in refuſing it, or wearying out his adverſaries by unjuſt delays.

CHAP. IX.

Of the Ambaſſador's Houſe and Domeſtics.

§ 117. Of the ambaſſador's houſe.

THE independency of the ambaſſador would be very imperfect, and his ſecurity weakly founded, did not the houſe in which he lives enjoy an intire exemption, ſo as to be inacceſſible to the ordinary officers of juſtice. The ambaſſador might be diſturbed under a thouſand pretences, his ſecrets might be diſcovered by ſearching his papers, and his perſon expoſed to inſults. Thus all the reaſons which

which eſtabliſh his independency and inviolability, concur likewiſe to ſecure the freedom of his houſe. This right of the character is generally acknowledged in all civilized nations: an ambaſſador's houſe is, at leaſt in all the common caſes of life, like his perſon, conſidered as out of the country. Of this, a few years ago there was a remarkable inſtance at Peterſburgh: Thirty ſoldiers, with an officer at their head on the 3rd of April 1752, entered the houſe of Baron GREIFFENHEIM the Swediſh miniſter, and carried away to priſon two of his domeſtics, for having clandeſtinely ſold liquors; this being a privilege limited to the imperial farm. The court, incenſed at ſuch a proceeding, cauſed the authors of the violence to be immediately taken into cuſtody, and the empreſs ordered ſatisfaction to be made to the offended miniſter: ſhe likewiſe ſent to him and other foreign miniſters, a declaration, expreſſing her concern and reſentment at what happened, with the orders which ſhe had given to the ſenate for proſecuting, as the chief delinquent, the commiſſioner of the office erected for hindering the clandeſtine ſale of liquors.

The houſe of an ambaſſador is to be defended from all outrage, under the particular protection of the law of nations, and thoſe of the country: to inſult it is a crime both againſt the ſtate and all other nations.

§ 118. Of the right of aſylum.

But the immunity and freedom of the ambaſſador's houſe is eſtabliſhed only in favour of the miniſter and his domeſtics; which is evident from the very reaſons it is grounded upon. May he avail himſelf of it for making his houſe an aſylum, and ſheltering the enemies of the prince, and malefactors of every kind, and thus ſecure them from the puniſhments which they have deſerved? Such proceedings would be contrary to all the duties of an ambaſſador, to the ſpirit with which he ſhould be animated, and to the lawful views on which he has been admitted. This is beyond doubt, but this is not all, and it may be laid down as a certain truth, that a ſovereign is not obliged to tolerate an abuſe

abuſe ſo pernicious to his ſtate, and ſo detrimental to ſociety. As for ſome common treſpaſſes of people, often rather unfortunate than criminal, or whoſe puniſhment is of no great importance to the tranquillity of ſociety; the houſe of an ambaſſador may indeed ſerve as an aſylum to ſuch, and it is better that delinquents of this kind ſhould be ſuffered to eſcape, than to expoſe the ambaſſador to frequent moleſtations, under pretence of a ſearch after them, and thus involve the ſtate in any difficulties which might ariſe from ſuch proceedings. And an ambaſſador's houſe being independent of the ordinary juriſdiction, no magiſtrate, juſtices of peace, or other ſubordinate officers, are in any caſe to enter it by their own authority, or to ſend any of their inſtruments unleſs it be on occaſions of a preſſing neceſſity, where the public welfare is in danger, and which admits of no delay. Whatever concerns a point of ſuch weight and delicacy; whatever affects the right and glory of a foreign power; whatever may embroil the ſtate with that power; is to be laid immediately before the ſovereign, and regulated by himſelf or on his orders, by his council of ſtate. Thus a ſovereign is to determine how far the right of aſylum, which an ambaſſador attributes to his houſe, is to be regarded; and if the delinquent be ſuch that his detention or puniſhment is of great importance to the ſtate, the prince is not to be with-held by the conſideration of a privilege which was never given for the detriment and ruin of ſtates. In the year 1726, the famous Duke de Ripparda having ſheltered himſelf in the houſe of Lord Harrington, ambaſſador from England, the council of Caſtile decided, "That he might be taken out of it, even by "force; ſince, otherwiſe, what had been ſettled for main-"taining a more connected correſpondence betwixt ſove-"reigns would, on the contrary, turn to the ruin and "deſtruction of their authority. Thus were the privi-"leges granted to the houſes of ambaſſadors merely for "common treſpaſſes, extended to the ſubjects, who had

« been depoſitories of the finances, forces and ſecrets of « the ſtate, when they had failed in the duties of their « miniſtry; it would be introducing a uſage, of all others « the moſt pernicious, and the moſt detrimental to all the « powers on earth, who, according to this maxim, would « be found not only to ſuffer, but even to ſee ſupported, « at their court, all who were contriving their deſtruc- « tion"(*a*). Nothing could be ſaid on this head with greater truth and judgement.

The abuſe of exemption has no where been carried farther than at Rome, where the ambaſſadors of crowned heads claim it for the whole ward in which their houſe ſtands. The popes, once ſo formidable to ſovereigns, have for above two centuries been in their turn under a neceſſity of dealing tenderly with them. It is in vain they have endeavoured to ſuppreſs, or at leaſt to reduce within proper limits, an abuſive privilege, for which the moſt ancient cuſtom is no valid plea, againſt juſtice and reaſon.

§ 119. Exemption of an ambaſſador's coaches.

An ambaſſador's coaches and carriages are equally privileged with his houſe, and for the ſame reaſons: to inſult them is an attack on the ambaſſador himſelf, and the ſovereign whom he repreſents. They are independent of all ſubordinate authority; no guards, commiſſioners, magiſtrates, or their inſtruments, are to ſtop and ſearch them without a ſuperior order; but here, as with regard to the houſe, the abuſe is not to be confounded with the right. It would be abſurd that a foreign miniſter ſhould have the power of conveying off in his coach a criminal of importance, whom it highly concerned the ſtate to ſecure, and this under the very eyes of the ſovereign, who thus would ſee himſelf denied in his own kingdom and court? Where is the ſovereign who would ſuffer this? The Marquis de FONTENAY, ambaſſador from France at Rome, ſheltered the Neapolitan exiles and rebels, and at laſt was for car-

(*a*) Memoires de M. l'Abbé de MONTGON. T. 1.

rying

rying them out of Rome in his coaches, but at the city gate the coaches were ſtopt by ſome Corſicans of the pope's guard, and the Neapolitans conveyed to priſon. The ambaſſador ſharply complained of it; but the pope anſwered, "That he had given orders for ſeizing thoſe whoſe eſcape "the ambaſſador had favoured; that ſince he took the "liberty of protecting villains and criminals of all kinds, "within the eccleſiaſtical ſtate, he who was ſovereign "ſhould at leaſt be allowed to lay hold of them again "whenever they could be met with; *as the rights and "privileges of ambaſſadors were not to be carried to ſuch a "height.*" The ambaſſador replied, "That it would not "appear he had harboured the pope's ſubjects, but only "ſome Neapolitans, whom he might very lawfully ſhelter "from the perſecutions of the Spaniards (*a*). This miniſter, in his anſwer, tacitly allowed, that had he made uſe of his coaches for the eſcape of any of the pope's ſubjects, and for ſcreening delinquents from juſtice, he could not reaſonably have complained of their being ſtopped.

§ 120. Of the ambaſſador's retinue.

The perſons in an ambaſſador's retinue partake of his inviolability; his independency extends to all his houſhold; theſe perſons are ſo connected with him, that they follow his fate. They depend immediately on him only, and are exempt from the juriſdiction of the country, into which they would not have come, but with this reſerve. The ambaſſador is to protect them, and whenever they are inſulted, it is an inſult on himſelf. Did not the domeſtics and houſhold of a foreign miniſter ſolely depend on him, it is known how very eaſily he might be moleſted and diſturbed in the exerciſe of his functions. Theſe maxims at preſent, are every where received and confirmed by cuſtom.

§ 121. Of the ambaſſador's conſort and family.

The ambaſſador's conſort is intimately united to him, and more particularly belongs to him than any other perſon

(*a*) Wiçquefort's ambaſſ. Book I. Sect. 28. towards the end.

of his houſhold. Accordingly ſhe ſhares his independency and inviolability; even diſtinguiſhed honors are paid her, which in ſome meaſure could not be denied her without affronting the ambaſſador. For theſe moſt courts have a fixed ceremonial. The regard due to the ambaſſador communicates itſelf likewiſe to his children, who alſo partake of his immunities.

§ 122. Of the ſecretary of the embaſſy.

The ambaſſador's ſecretary is one of his domeſtics, but the ſecretary of the embaſſy has his commiſſion from the ſovereign himſelf, which makes him a kind of public miniſter, and he in himſelf is protected by the law of nations, and enjoys immunities independent of the ambaſſador; to whoſe orders he is indeed but imperfectly ſubjected, ſometimes not at all, and always according to the determination of their common maſter.

§ 123. Of the ambaſſador's couriers and diſpatches.

Couriers ſent or received by an ambaſſador, his papers, letters, and diſpatches, all eſſentially belong to the embaſſy, and conſequently are to be ſacred; as without a regard to them the embaſſy could not obtain its lawful ends, nor the ambaſſador diſcharge his functions with proper ſecurity. The States General of the United Provinces have decided, whilſt the preſident JEANNIN reſided with them as ambaſſador from France, that to open the letters of a public miniſter was a breach of the laws of nations (*b*). Other inſtances may be ſeen in WICQUEFORT. Notwithſtanding this privilege on momentous occaſions, when the ambaſſador himſelf has violated the law of nations, by forming or countenancing plots or conſpiracies againſt the ſtate, his papers may be ſeized, for diſcovering the whole ſecret, and knowing the accomplices; on ſuch an exigency, he may be perſonally put under an arreſt, and interrogated (Sect. 99). This was done to the letters which ſome traitors to their country had delivered to TARQUIN's ambaſſador (Sect. 98).

(*b*) WICQUEFORT's Book I. Sect. 27.

The

§ 124. The ambaſſador's authority over his retinue.

The perſons of a foreign miniſter's retinue being independent of the juriſdiction of the country, cannot be taken into cuſtody or puniſhed without his conſent; yet were it highly improper that they ſhould enjoy an abſolute independency, and be at liberty confidently to run into all manner of licentiouſneſs. The ambaſſador is neceſſarily inveſted with all the authority neceſſary for keeping them in order: ſome will have this authority to include even life and death. When the Marquis de Roſny, afterwards Duke de Sully, was in England as ambaſſador extraordinary from France, a gentleman of his retinue committed a murder, which cauſed a great noiſe among the people of London. The ambaſſador aſſembled ſome French noblemen who attended him, tried the murderer, and ſentenced him to loſe his head. He then acquainted the Lord Mayor of London, that he had tried the criminal, and deſired officers and an executioner; but afterwards conſented to deliver up the criminal to the Engliſh, that they might proceed as they thought proper; and M. de BEAUMONT the French ambaſſador in ordinary, the young gentleman being his relation, prevailed on the King of England to pardon him (*e*). It lies in the ſovereign's breaſt to extend the ambaſſador's power over his retinue to ſuch a degree; and the Marquis de Roſny was thoroughly aſſured of his maſter's approbation; but in general the ambaſſador is to be ſuppoſed to have only a coercive power, ſo that he may keep his dependents in order by confinement and other penalties, ſuch as are not capital or infamous. He may puniſh the faults committed againſt himſelf and his maſter's ſervice, or ſend the delinquents to their ſovereign, in order to their being puniſhed. But ſhould his people become guilty towards ſociety, by crimes deſerving a ſevere puniſhment, the ambaſſador is to diſtinguiſh between the domeſtics of his own nation and thoſe

(*e*) Sully's Memoirs, Vol. I. Chap. I.

belonging

belonging to the country where he reſides. The ſhorteſt and moſt natural way with the latter is to caſhire them, that they may be delivered into the hands of juſtice. As to thoſe of his nation, if they have offended the ſovereign of the country, or committed any of thoſe atrocious actions, the puniſhment of which concerns all nations, and whom for that reaſon it is uſual among nations to claim and deliver them up; why ſhould he not give them up to the nation requiring their puniſhment? If the fault be of another kind, he is to ſend them back to their ſovereign. In fine, where the caſe is dubious, the ambaſſador is to keep the criminal in irons till he receives orders from his court? But if he paſſes a capital ſentence on the criminal, I do not think he can execute it within his houſe; an execution of this nature being an act of territorial ſuperiority belonging only to the ſovereign of the country. And if the ambaſſador, together with his houſe and houſhold, be reputed out of the country, it is but a mode of expreſſing his independency, and all the rights neceſſary to the lawful ſucceſs of the embaſſy. This fiction cannot imply privileges reſerved to the ſovereign, too tender and important to be communicated to a ſtranger, and not neceſſary to the ambaſſador for the worthy diſcharge of his embaſſy. If the offence be againſt the ambaſſador or againſt the ſervice of his maſter, the ambaſſador may ſend the delinquent to his ſovereign. If the crime concerns the ſtate where the miniſter reſides, he may try the criminal, and on finding him guilty of death, he is to give him up to the juſtice of the country, as did the Marquis of Roſne.

§ 125. When the rights of an ambaſſador end.

When the commiſſion of an ambaſſador is at an end, when he has terminated the affairs which brought him, when he is recalled or diſmiſſed; in a word, when he is obliged to go away on any account whatever, his functions ceaſe; but his privileges and rights do not expire at the ſame time: he retains them till his return to his principal,

pal, to whom he is to make a report of his embaſſy. His ſafety, his independence, and inviolability, are not leſs neceſſary to the ſucceſs of the embaſſy in his return, than at his coming. Accordingly when an ambaſſador departs by reaſon of a war kindling between his maſter and the ſovereign at whoſe court he was negotiating, a ſufficient time is allowed him for his ſafe departure. And if he returns by ſea, and ſhould happen to be taken in the paſſage, he would be immediately releaſed, as he could not lawfully be detained.

§ 126. Of the caſes when credential letters are neceſſary.

For the ſame reaſons the ambaſſador's privileges ſubſiſt even when the activity of his miniſtry becomes ſuſpended, and he ſtands in need of freſh powers. This caſe happens by the death of the prince whom the miniſter repreſents, or of the ſovereign at whoſe court he reſides. On either occaſion the miniſter muſt have freſh credentials. Though it is leſs neceſſary in the latter caſe than in the former, eſpecially if the ſucceſſor of the deceaſed prince be the natural and neceſſary ſucceſſor; becauſe the authority whence the miniſter's power flowed, ſtill ſubſiſting, it is eaſily conceived that he remains in the ſame quality with the new ſovereign; but if the miniſter's maſter is no more, his powers expire, and the ſucceſſor's credentials are abſolutely neceſſary for authoriſing him to ſpeak, and act in his name. Yet he continues during the interval the miniſter of the nation, and as ſuch he is to enjoy the rights and honors annexed to that character.

§ 127 Concluſion.

At length I have reached the end of my propoſed career, I do not pretend to have given a perfect, full, and complete treatiſe of the law of nations; it was not indeed my deſign, and in ſo vaſt and rich a ſubject, it would have been preſuming too much on my abilities. I ſhall think I have done a great deal, if my principles are approved by intelligent perſons as ſolid, luminous, and ſufficient to give a proper ſolution of the queſtions that ariſe in particular caſes.

caſes. I ſhall be happy if my labours may be of ſome uſe to thoſe men in power who love mankind and revere juſtice; if they furniſh them with arms for defending what is right, and for compelling the unjuſt, to obſerve, at leaſt, ſome meaſures, and to keep within the bounds of decency!

FINIS.

10-7-41

Distance